Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

JOHN M. GIOVANELLA,

Petitioner,

v.

TOWN OF ASHLAND CONSERVATION COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

John Giovanella owned two pieces of property in Ashland, Massachusetts. One is a vacant lot, and one is a lot with a home on it. The lots are separately divided, independently useful, assessed separately for tax purposes, and have different addresses, but are next door to each other. The Town of Ashland has denied all economically beneficial uses of the vacant lot to preserve it in a natural state. The question presented is:

Whether it is appropriate, in regulatory takings analysis, to combine a legally separate and independently economically viable lot with a previously developed lot, because the lots happen to be contiguous and owned by the same person, and to thereby defeat a claim that the government has taken one of the lots?

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PETITION FOR WRIT OF CERTIORARI

John M. Giovanella respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts.

OPINIONS BELOW

The Opinion of the Supreme Judicial Court of Massachusetts is reported at ---N.E.2d---, 447 Mass. 720, 2006 WL 3393153 (Nov. 28, 2006); it appears as Appendix A to the petition. (App. A.) The decision of the Superior Court, Middlesex County, is unreported; it appears as Petitioner's Appendix B (App. B).

JURISDICTION

The Supreme Judicial Court of Massachusetts entered judgment on November 28, 2006 (App. A-1). This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

ORDINANCES AT ISSUE

Section 280-1 of the Town of Ashland Wetlands Protection Bylaw, entitled "Construction in or near Wetland Resource Area," provides in pertinent part:

> No work or disturbance, including but not limited to grading, vegetation removal, or disturbance, shall be permitted within twenty-five (25) feet of any Bordering Vegetated Wetland or Bank area, unless the applicant provides information and evidence that the work to be performed sufficiently protects or enhances wetland interests.

STATEMENT OF THE CASE

A. Facts

1. The Parcels

In early 1999, Giovanella purchased two separately divided lots of residentially zoned land in the Town of Ashland (Town). App. A-3, App. B-2. The lots were almost identical in size, at a little over 17,000-square-feet each. At the time of purchase, one lot was vacant (Lot 1) and a small house existed on the other lot (Lot 2). App. A-2.

Lot 1 is the same size or smaller than neighboring lots, all of which have been residentially developed. As a "pre-existing, nonconforming" lot, Lot 1 was also subject to residential use with a special permit designed to waive the minimum lot size requirements. App. A-18. Indeed, under the Town code, the only use allowed for Lot 1 is residential use with such a special permit. Town of Ashland Zoning By-Law, § 282-21.

Between three to six months after the purchase, Giovanella decided to build a small house on Lot 1, into which he hoped to move. App. A-3. The Town subsequently adopted a new

wetlands buffer law that restricted all work or disturbance within twenty-five feet of any wetland area. App. A-4. This law potentially affected Giovanella's plans for Lot 1, as it has "a small wetland in the northwest corner," App. A-3, one formed by water running through a drainpipe under a neighbor's abutting turf lawn.

2. The Permit Denial

Giovanella soon applied for the special permit allowing residential construction on Lot 1. App. A-4; B-2. Upon determining that Lot 1 was a legal preexisting lot, that residential building was consistent with the neighborhood, and would not result in a nuisance, the Town granted a special permit waiving the standard lot size rules. App. A-4. Final approval was, however, subject to review by the Town Conservation Commission (Commission). *Id.*; App. B-2.

At hearings on Giovanella's application, the Commission focused on the impact of building on the new wetlands buffer zone applicable to Lot 1. App. A-4; App. B-2 to B-3. Giovanella's civil engineer testified that Giovanella's planned home would not encroach on the wetland area itself or the 25-foot buffer zone. Under the development plan, construction activities would also not intrude into the wetland, but would intrude into the buffer zone. This encroachment was necessary because Giovanella's plan already utilized reduced areas and setbacks (pursuant to the special permit) and building could not be moved any farther from the zone. The Commission was told that no home could be built on Lot 1 without some intrusion into the buffer zone and, therefore, that to strictly enforce the zone would deny all use of Lot 1. *Id.*

Faced with the Commission's continuing concern that an exception to the buffer zone might negatively impact the wetland area, Giovanella proposed a second development plan. Under the second plan, Giovanella would create a large, new wetland area on Lot 1 adjacent to the existing area to offset any

potential construction impact on the small wetland area. *See* App. A-4.

On May 7, 2001, the Commission denied both of Giovanella's plans. In so doing, the Commission expressed a desire to enforce the buffer zone and concern that a home might potentially cause household pollution (from lawn fertilizer) and wildlife disturbance at the wetland site. App. A-4 to A-5. Giovanella asked the Commission to reconsider, but it declined. App. A-6.

Lot 1 was subsequently appraised as having a value of $0.00. *Id.* A little more than a year later, Giovanella sold Lot 2 (the lot with the existing home) for $319,900. Giovanella did not market the valueless Lot 1 because he still wished to build a home on that lot. App. A-5.

B. Judicial Proceedings

1. Initial Procedure

After the denial of his plans for a home on Lot 1, Giovanella sued the Town, alleging in part that the Town's actions had effected an unconstitutional taking of his property in violation of the Fifth Amendment to the United States Constitution. In an opinion of December 30, 2004, the superior court held that the permit denial for Lot 1 did not cause a taking. In so doing, the trial court held that the regulated lot had to be conceptually aggregated with Giovanella's adjacent, developed lot for purposes of takings analysis. App. B-8. Under this approach, the court held that the application of the new wetland buffer regulation to render Lot 1 valueless did not deprive Giovanella of all economically beneficial use of his (combined) property so as to cause a per se regulatory taking. *Id.*

The trial court then applied the balancing test of *Pennsylvania Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), to the aggregated lots, and held that

no taking had occurred under that test. In so doing, the court held that Giovanella lacked reasonable investment-backed building expectations because he needed a special permit (which he later obtained) at the time of acquisition. App. B-10.

Giovanella then petitioned the Supreme Judicial Court of Massachusetts for direct appellate review of the case. App. A-3. In the petition, Giovanella specifically sought consideration of whether the trial court correctly determined that his combined lots, rather than just the regulated Lot 1, was the "relevant parcel" for takings analysis. The court granted review, and on November 28, 2006, issued a published decision in this case. *See* App. A.

2. The Supreme Judicial Court of Massachusetts Addresses the Relevant Parcel Issue

In considering Giovanella's takings claim, the Supreme Judicial Court of Massachusetts recognized that it first had to decide whether Giovanella's restricted Lot 1 was subject to takings scrutiny apart from his other lot. In the court's words, it had to define "the unit of property at issue, often called the 'relevant parcel.'" App. A-8. The Massachusetts court acknowledged that this inquiry was critical to regulatory takings liability:

> When a court considers a large piece of land of which only a small portion has lost value due to regulation, it is less likely to conclude that a taking has occurred. If a court considers a smaller parcel of land, most of which has been affected by a regulation, then the economic impact is more likely to appear large enough to constitute a taking.

The court continued:

> This has come to be known as the "denominator problem," and it has proved to be a hard problem to solve. The denominator problem has become an even more critical issue since the creation of the *Lucas* categorical rule. If a landowner is able to define the "relevant parcel" as only that part of land rendered valueless due to regulation, then the owner is automatically entitled to compensation for the value of that land. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181-82 (Fed. Cir. 1994) (severing twelve and one-half affected acres from larger 250-acre parcel and finding categorical taking). At the same time, the benefits of an easily applied, bright-line rule are lost because the *Lucas* categorical rule "does not make clear the 'property interest' against which the loss of value is to be measured." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

App. A-8 to A-9.

The lower court lamented that the "Supreme Court has provided only minimal guidance for resolving the denominator problem" and that the Court's "[r]epeated admonitions to use the 'parcel as whole' . . . do little to define the contours of that whole parcel in any particular case." App. A-9. The court therefore turned to other lower federal and state decisions for guidance on the method for determining whether Giovanella's regulated (and valueless) lot should be viewed as the "relevant parcel."

3. The Lower Court Adopts New Principles and Combines Giovanella's Parcels to Deny His Takings Claim

Upon reviewing lower court decisions, the Supreme Judicial Court of Massachusetts concluded that "the extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel." App. A-12. In so doing, the court conceded that "few courts explicitly employ this presumption in favor of contiguous commonly-owned property." App. A-15.

In adopting a presumption in favor of aggregating contiguous parcels, the lower court held that a parcel's separate legal recognition under state and local law was not of "particular significance." The court additionally held that the independent "economic viability of land does not define its boundaries for purposes of the takings clause," and that the lack of a common development scheme was similarly unimportant in determining if two parcels should be treated separately. The lower court thus declared: "[o]ur reliance on contiguous property minimizes the significance of lot lines in defining the boundaries of the denominator. Separate addresses or tax treatment as separate lots similarly carries little weight . . . ." App. A-14.

According to the decision of the Supreme Judicial Court of Massachusetts, only "an owner's intended use," and particularly, whether the owner meant to use his parcels as separate economic units, might overcome the presumption of aggregation. The court held it is the property owner's "burden to show that he intended to, or actually did, treat [his lots] separately." *Id.* at A-17.

Turning to the facts of Giovanella's case, the lower court held that Giovanella had not rebutted the presumption that his contiguous lots should be combined to create the relevant takings parcel, because "the separate addresses, tax treatment, and lot

lines [of Lot 1] are of minimal significance, and by themselves do not provide evidence of his separate treatment of the contiguous lots." The court also rejected the lots' independent economic usefulness and the "absence of evidence . . . that [Giovanella] treated [his lots] as one unit," as a basis for separate treatment. App. A-16 to A-17.

On the Town's liability, the lower court recognized that its decision to "consider[] lots 1 and 2 together forecloses any compensation under *Lucas*." App. A-17. It therefore applied the *Penn Central* test to the combined lots, concluding first that the trial court erred in holding Giovanella could have no reasonable development expectations because he needed a special permit. The court stated: a "person in Giovanella's situation may well have relied on his ability to build on lot 1 based on its similarity to the surrounding lots on which homes had already been built, or based on the availability of special permits for preexisting nonconforming lots." App. A-18.

Nevertheless, the lower court held that Giovanella did not have investment-backed expectations because of a lack of discreet financial investment in Lot 1 for development purposes at the time of purchase. *Id.* The court additionally held the economic impact and character of the governmental action were not oppressive enough to warrant a taking under *Penn Central*. App. A-19 to A-20.

Giovanella now seeks this Court's review on the issue of whether the lower court correctly denied Giovanella's takings claim by aggregating his regulated parcel with the adjacent developed parcel based on contiguity and common ownership.

REASONS FOR GRANTING THE WRIT

I

WHETHER TO TREAT A CLAIMANT'S REGULATED PARCEL INDEPENDENTLY FROM A COMMONLY OWNED PARCEL FOR REGULATORY TAKINGS ANALYSIS IS AN IMPORTANT ISSUE ON WHICH LOWER COURTS ARE IN DEEP CONFUSION AND CONFLICT

On perhaps the most critical unresolved question of federal regulatory takings law—when to treat a regulated parcel of land apart from a commonly owned parcel in applying takings standards—the Supreme Judicial Court of Massachusetts reached a decision that perpetuates the lower courts' considerable confusion and conflict on the issue. Because the issue of how to identify the "relevant parcel" has sufficiently percolated through the lower courts, without any agreement on the proper approach, it is appropriate for this Court to provide guidance.

A. The Issue

"[I]f regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This Court has made clear this regulatory takings line is crossed, and compensation required, when a land use restriction deprives a property owner of all economically beneficial use of property or when it has a severe impact on the property and the owner's investment-backed expectations. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 607 (2001).

Both standards require courts to measure the value and use of property before and after application of the challenged land use restriction. *See Keystone Bituminous Coal Ass'n v.*

DeBenedictis, 480 U.S. 470, 497 (1987) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property."). Yet, a court cannot begin to compare before and after property values until it first determines "the unit of property 'whose value is to furnish the denominator of the fraction.'" *See id.* When land is at stake, this issue is often described as the "relevant parcel" question. *See* Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. Haw. L. Rev. 353, 356 (2003) ("Determining the total property against which the loss [caused by regulation] must be measured is what we call the 'relevant parcel' question.").

The "definition of the relevant parcel profoundly influences the outcome of a takings analysis." *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999). An expansive definition of the relevant parcel will make the regulatory impact on the owner's property seem less severe and diminish the chances that a taking will be found. On the other hand, a spare definition will increase the odds of a taking. Given this effect, "the relevant parcel of land is key to the inquiry" into takings liability. *Animas Valley Sand and Gravel, Inc. v. Board of County Commissioners*, 38 P.3d 59, 67 (Colo. 2001); *see also*, John E. Fee, *Of Parcels and Property in Taking Sides on Takings Issues: Public and Private Perspectives* 101 (Thomas E. Roberts, ed. 2002) ("How to define the horizontal boundaries of land . . . is perhaps the most significant unresolved question" in takings law).

As the decision below aptly shows, in practice, an expansive conception of the relevant parcel is often determinative, allowing the government to escape liability for a taking. *See* App. A-17; Thomas J. Koffer, *What to "Take" From Palazzolo and Tahoe-Sierra: A Temporary Loss for Property Rights*, 21 Va. Envtl. L.J. 503, 525 (2003) ("How the relevant parcel is defined may alone determine whether the government or property owner prevails in a takings claim."); Richard M.

Frank, *Inverse Condemnation Litigation in the 1990's—The Uncertain Legacy of the Supreme Court's Lucas and Yee Decisions*, 43 Wash. U.J. Urb. & Contemp. L. 85, 104 (1993) ("To a considerable degree the answer to this [relevant parcel] question dictates whether a taking has occurred.").

B. Although this Court's Jurisprudence Recognizes the Importance of the Relevant Parcel Issue, It Does Not Provide Sufficient Guidance

1. The Existing Precedent Does Not Address the Issue

Despite the importance of the relevant land parcel determination in regulatory takings doctrine, this Court's decisions do not address the issue. Occasionally, the Court has observed that regulatory takings analysis should focus on the "parcel as a whole." *Keystone*, 480 U.S. at 497 (quoting *Penn Central*, 438 U.S. at 130-31 ("[T]his Court focuses . . . on the nature and extent of the interference with rights in the parcel as a whole.")).

But without elaboration, this "whole parcel" principle; i.e, that a parcel should be viewed as a "whole" rather than divided, provides little to guide the relevant parcel inquiry in concrete circumstances. As the court below noted, "[r]epeated admonitions to use the "parcel as whole" . . . do little to define the contours of that whole parcel in any particular case." App. A-9. Indeed, such admonitions simply beg the question of how to find the "whole" parcel which a court is not to divide.

Unfortunately, this Court's existing precedent does not answer this critical question. *See* John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi L. Rev. 1535, 1542 (1994) ("The Court has not articulated a method for defining the 'parcel as a whole.' "); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 705

(1996) ("The Court has not provided any formula for determining what constitutes the 'parcel as a whole.'"). This Court's decisions do not provide a general framework, which might assist the relevant parcel inquiry, for deciding when to isolate or aggregate a claimant's property interests. Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 Marq. L. Rev. 9, 16 (1997) ("The Supreme Court's views on this issue are conflicting, and no principled basis for determining the segmentation of property interests has emerged."); Lisker, *supra*, at 705 (the Court "has taken no steps to remedy the [relevant parcel] situation.").

Nor do any of the Court's decisions involve the typical relevant parcel scenario in which a takings claimant owning a restricted parcel also owns additional land. *District Intown Properties*, 198 F.3d at 887 (Williams, J., concurring) ("The Court has never squarely addressed the question of how courts should define the relevant geographic parcel of land."). In such a scenario, the relevant parcel could be only the restricted land, all of the commonly owned property, or something in between, with the outcome on this question going far to determine the issue of liability. But, since there is no method for defining the "whole" parcel, and no case factually on point, there is no way to predict.

2. The Court Has Acknowledged the Need to Address the Relevant Land Parcel Issue, but the Question Has Escaped Review Until Now

To its credit, the Court has recognized that something beyond the "parcel as a whole" is needed to adequately address the relevant parcel problem. In *Lucas*, the Court confessed that "regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since *the rule does not make clear the 'property interest' against which the loss of value is to be measured.*" *Lucas*, 505 U.S. at

1016 n.7 (emphasis added). The *Lucas* Court suggested that the relevant parcel problem might be solved by considering "how the owner's reasonable expectations have been shaped by the State's law of property; i.e. whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land" alleged to be taken." *Id.* Yet, while clearly frustrated and intrigued by the issue, the *Lucas* Court could not squarely address it because both of Lucas' lots were regulated and "left . . . without economic value." *Id.*

In the 2001 case of *Palazzolo*, the relevant parcel issue arose again, as the Court was asked to examine what it called the "difficult, persisting question of what is the proper denominator in the takings fraction." *Palazzolo*, 533 U.S. at 631. While recognizing "discomfort" with the notion that the "whole parcel" principle was the only guidance provided by its precedent, the Court again had to let the issue go, this time because it was not properly raised below. *See id.*[1]

Unlike *Lucas* or *Palazzolo*, this case provides an appropriate vehicle for resolving the critical question of whether to isolate an owner's regulated land from other land for takings purposes. The lower court correctly held that Giovanella's takings claim was ripe for resolution, App. A-5 to A-6, and the relevant parcel issue was properly raised. App. B-7. The lower court directly addressed the issue in a manner that disposed of a takings claim, leaving Giovanella's property in a natural state for a public purpose, but without compensation. App. A-17.

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[1] The *Lucas* and *Palazzolo* statements on the relevant parcel problem suggest to some courts that "some members of the Court have retreated from the absolute application of the 'property as a whole' rule" in the context of regulated land. *Machipongo Land and Coal Co., Inc. v. Pennsylvania*, 799 A.2d 751, 767-68 (Pa. 2002). Other courts ignore the statements as "dicta." *Zealy v. Waukesha*, 548 N.W.2d 528, 532 (Wis. 1996). Either way, because no case squarely confronts the issue, the Court's occasional intimations of uncertainty leave the relevant parcel issue more unsettled than ever.

Therefore, the decision below presents a significant opportunity for this Court to finally bring clarity to the "difficult, persisting question of what is the proper denominator in the takings fraction" in the context of multiple land parcels. *Palazzolo*, 533 U.S. at 631.

This Court should review the important relevant land parcel issue presented here to clarify whether it is proper, under this Court's understanding of the Fifth Amendment, to combine legally and developmentally distinct lots to find the "parcel as a whole" that is subject to application of this Court's regulatory takings tests.

C. The Lower Courts Are in Conflict

Left without concrete guidance from this Court on whether to combine an owner's regulated land with his other property for takings analysis, lower federal and state courts have adopted inconsistent and contradictory methods. Like the court below, some federal and state courts have focused on contiguity and landowner treatment to find the relevant parcel; this approach typically leads to aggregation of property, and the denial of the takings claim.

Other courts point to objective factors associated with the character of the property, the regulation, and/or the development. This approach rarely leads to aggregation of parcels or rejection of the takings claim. A direct conflict between the decision below and the recent decision of the Idaho Supreme Court in *Coeur D' Alene v. Simpson*, 136 P.3d 310 (Idaho 2006), also issued this year, illustrates the divide.

In *Simpson*, the Idaho court emphasized that, when parcels are in common ownership, "the [property] interest at stake must always be considered in light of established principles of state property law." *Id.* at 319. The Idaho court concluded that independent economic viability is important to whether a regulated parcel is separate for takings analysis, as "[t]he

economic independence test accounts for the very factors by which property is defined, at least in the takings context: use, economics, and regulation." *Id.* at 323. The *Simpson* court also considered taxation as a separate unit relevant, *id.*, and whether the restricted parcel was regulated differently than the other parcel. The Idaho court accordingly refused to presumptively aggregate two nearby parcels, one of which was stripped of all economic use, allowing a takings claim to survive.

The Supreme Judicial Court of Massachusetts rejected the Idaho approach, holding that the "treatment of [the claimant's] property under State law [was not] of particular significance," that separate "lot lines, addresses or tax treatment as separate lots similarly carries little weight," that "the economic viability of land does not define its boundaries for purposes of the takings clause;" and completely ignoring distinct regulation as a factor. App. A-16. As a result, the Massachusetts court combined Giovanella's regulated lot with his commonly owned, developed lot and in this way, defeated his takings claim. App. A-17.

The clear split between Massachusetts and Idaho is only one illustration of the conflict among the lower courts on the factors that control the determination of the relevant takings parcel. As the following shows, the confusion is pervasive, involving both federal courts and many state supreme courts.

1. Federal Courts: Some Focus on the Nature of the Claimant's Parcels, the Development, and the Scope of Regulation

The Federal Circuit: In contrast with Massachusetts, the Federal Circuit's relevant parcel decisions look beyond contiguity and subjective treatment to whether the parcels are "legally" distinct, *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000); the "timing of property acquisition and development" compared with the regulation, *Loveladies Harbor, Inc.*, 28 F.3d at 1181; and whether there is a single, common development plan, *Forest Properties, Inc. v.*

United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999). This framework often results in viewing the regulated parcel as a separate unit and makes takings liability more likely. *Loveladies*, 28 F.3d at 1181-82. If applied here, it would most probably result in separate takings scrutiny for Giovanella's lots. App. A-3; A-16 (noting different legal treatment, that one lot was developed long before the other, and no common development scheme).

The Ninth Circuit: Similar to the Federal Circuit, and unlike the Massachusetts court, the Ninth Circuit has emphasized independent economic viability and the existence of a common development plan to identify whether the regulated parcel is analyzed apart from the owner's other property. *American Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371-72 (9th Cir. 1981). Under this approach, contiguously owned parcels are not presumptively aggregated. *Id.*

2. Other Federal Courts Focus on Contiguity

The D.C. Circuit: In conflict with the Federal and Ninth Circuits, but in line with Massachusetts, the D.C. Circuit Court of Appeals "applies an apparent presumption that contiguous parcels under common ownership should be treated as one parcel for purposes of the takings analysis." *District Intown Properties Ltd.*,198 F.3d at 885 (Williams, J., concurring) (commenting on majority decision, 198 F.3d at 880). This presumption aggregates even independently divided, taxed, and useful lots, *id.* at 880, and thus "tends to reduce the likelihood that courts will order compensation." *Id.* at 885 (Williams, J., concurring).

3. State Courts: Like Idaho, Some States Weigh the Legal and Economic Characteristics of the Claimant's Parcels

California: Consistent with Idaho, but in conflict with Massachusetts, California considers whether the takings

claimant's parcels are independently economicically viable; *Twaine Harte Associates, Ltd. v. County of Tuolumne*, 217 Cal. App. 3d 71, 88 (1990), and/or separated by regulation. *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 495-96 (1982). This approach disfavors aggregation. *Id.* If applied to this case, California's rules would likely identify Giovanella's lots as separate takings units because they are independently economically viable and subject to different regulation. *See* App. A-16, A-4.

Florida: Florida adheres to an approach manifestly in conflict with Massachusetts, applying a "presumption of separateness" as to vacant, platted city lots, and considering legal division, independent use, and marketability to be more important than contiguity. *Department of Transportation, Division of Administration v. Jirik*, 498 So. 2d 1253, 1255-57 (Fla. 1986). This framework has resulted in refusal to aggregate an owner's parcels and recognition of a valid takings claim, s*ee id.* at 1255, and would likely cause the same result here.

Ohio: Ohio looks to whether the claimant's regulated parcel is economically valuable prior to regulation in considering whether it should be viewed apart from other areas, a test that weighs against aggregation. *State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002).

Oregon: In Oregon, the scope of the regulation; i.e, whether it applies to only part or all of the owner's land, controls the relevant parcel inquiry; this tends not to result in aggregation of parcels. *Fifth Avenue Corp. v. Washington County*, 581 P.2d 50, 60 (Or. 1978).

4. Like Massachusetts, Other States Rely Almost Solely on Contiguity and/or Landowner Intentions, in Conflict with Idaho, California, and Oregon

Colorado: In tension with Idaho and other states that consider the nature of property and state understandings, but consistent with Massachusetts, Colorado decides whether to aggregate a takings claimant's regulated and unregulated parcels based on contiguity. *Animas Valley Sand & Gravel, Inc.*, 38 P.3d at 68-69.

Michigan: Michigan's supreme court has concluded that contiguity requires combining an owner's regulated and unregulated parcels, even those that are separately divided and taxed, and denial of a takings claim. *Bevan v. Brandon Township*, 475 N.W.2d 37, 42-44 (Mich. 1991). In this, Michigan is squarely in the Massachusetts camp and opposed to states like Idaho, Florida, and California that consider separate legal status and independent developmental capability to warrant independent takings treatment.

Wisconsin: Wisconsin also relies on contiguity to determine if an owner's regulated parcel should be combined with an unregulated parcel. *Zealy*, 548 N.W.2d at 532. Wisconsin arrived at this approach by construing this Court's "parcel as a whole" statements as a per se rule requiring aggregation of land interests. *See id.* As in Massachusetts, this test favors aggregation of an owner's land and denial of a claim of a taking. *Id.* at 533.

5. Still Other Courts Apply a Multi-Factor Approach That Considers Both Contiguity (Massachusetts) and the Legal and Developmental Status of the Parcels (Idaho)

Pennsylvania: Pennsylvania considers many factors, with none apparently more significant than any other, including

> contiguity of ownership, dates of acquisition, extent to which the proposed parcel has been treated as a single unit, extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of developing regulatory environment, the owner's investment backed-expectations, and, the landowner's plans for development.

Machipongo, 799 A.2d at 768-69.

New Jersey: New Jersey similarly considers many equally-weighted factors including contiguity, common ownership, the timing of the parcels' acquisition, whether the rights in one parcel are dependent on the other parcel, and how the properties are assessed for tax purposes. *Karam v. New Jersey, Department of Environmental Protection*, 705 A.2d 1221, 1228 (N.J. Ct. App. 1998).

As the foregoing shows, lower federal and state courts are in deep disagreement on how to determine whether a regulated parcel of land should be analyzed separately from other property owned by the claimant. *East Cape May Assoc. v. New Jersey*, 693 A.2d 114, 128 (N.J. Sup. A.D. 1997) (cases "indicate the presently unsettled state of . . . federal law on the question of how to determine the relevant 'property'"). Because of the disagreement, constitutional protection for interests in land depends greatly on the jurisdiction in which the claim for a taking of the land arises. The just compensation rights

guaranteed by the Fifth and Fourteenth Amendments of the Constitution should apply evenly, and not because of the location of the claimant's land. Yet, the happenstance of location is key in the current environment, where courts apply widely divergent approaches to the relevant parcel issue, and that issue often determines whether a compensable taking has occurred. The Court should redress this situation by providing a cognizable framework for defining the "parcel as a whole" where the claimant holds more than one parcel of land, thereby resolving the conflicts among the lower courts on this important issue.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: January, 2006.

Respectfully submitted,

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Appendix A-1

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MIDDLESEX

No. SJC-09678

John M. GIOVANELLA

v.

CONSERVATION COMMISSION OF ASHLAND

September 5, 2006.
November 28, 2006.

Background: Owner of two contiguous lots, one of which contained a wetland, brought action challenging decision of municipal conservation commission denying his request for allowance to construct house on the lot containing a wetland, and alternatively, seeking damages for a regulatory taking under the Fifth Amendment to the United States Constitution. The Superior Court, Middlesex County, S. Jane Haggerty and Bonnie H. MacLeod, JJ., entered summary judgment in favor of commission. Property owner appealed.

Holdings: The Supreme Judicial Court, Spina, J., held that:

(1) regulatory taking claim was ripe for review;

(2) extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel for purposes of regulatory takings analysis;

(3) owner failed to overcome presumption that contiguous commonly-owned lots were the relevant parcel for purposes of takings claim; and

(4) application of wetlands protection bylaw did not result in regulatory taking.

Affirmed.

* * *

The Supreme Judicial Court granted an application for direct appellate review.

J. David Breemer, of California, for the plaintiff.
Joseph M. Hamilton for the defendant.
Michael E. Malamut & Martin J. Newhouse, for New England Legal Foundation, amicus curiae, submitted a brief.

Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, & Cordy, JJ.

SPINA, J.

This appeal asks us to define the "relevant parcel" in a regulatory takings analysis. The plaintiff, John M. Giovanella, owned two contiguous lots in Ashland. One of the lots contained a house. Giovanella sought an order of conditions from the defendant, the conservation commission of Ashland (commission), that would allow him to build a house on the other lot. The commission denied his request because construction of the house would intrude into the twenty-five foot buffer zone around a wetland on the lot, in violation of a local bylaw. Giovanella filed suit in the Superior Court, seeking annulment of the commission's decision and, alternatively, damages for what he alleges on appeal was a regulatory taking under the Fifth Amendment to the United

States Constitution.[1] On Giovanella's motion for summary judgment, the judge concluded that Giovanella failed to show that the decision of the commission was arbitrary or capricious. That portion of the judgment has not been appealed. The judge also ruled that the relevant parcel for purposes of the takings analysis was the entire parcel that Giovanella purchased, and not just the lot he sought to develop. The judge concluded that Giovanella had not shown sufficient economic harm as a result of the commission's decision, and had not shown a reasonable investment-backed expectation that he would be able to develop the lot in question. Based on these conclusions, a second judge granted the commission's subsequent motion for summary judgment. Giovanella appealed the ruling. We granted Giovanella's application for direct appellate review, and we now affirm.[2]

1. Background. On March 31, 1999, Giovanella purchased land in the town of Ashland (town) for $130,000. The property, which consisted of 34,589 square feet of land, had a small wetland in the northwest corner, and a single family residence on the southern portion. Between three and six months after buying the property, he learned that a previous owner had divided the property into two lots of nearly equal area. The lots were assessed separately for tax purposes, and had different addresses. The house was situated on lot 2, and the wetland on lot 1. When he learned the property had been

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[1] The plaintiff, John M. Giovanella, does not argue that the application of the bylaw resulted in a taking under art. 10 of the Massachusetts Declaration of Rights. We analyze his claim only under the Fifth Amendment to the United States Constitution.

[2] We acknowledge the amicus curiae brief submitted by the New England Legal Foundation.

divided he decided to build a new house on lot 1, into which he planned to move.

In December, 1999, nine months after Giovanella purchased the property, the town adopted a wetlands protection bylaw. The bylaw prohibited all work or disturbance within twenty-five feet of any wetland area "unless the applicant provides information and evidence deemed satisfactory by the [c]ommission that the work to be performed sufficiently protects or enhances wetland interests." The wetland in the northwest corner of lot 1 was protected by this bylaw.

Sometime before March 21, 2000, Giovanella applied to the zoning board of appeals of Ashland (board) for a variance that would allow him to build a house on lot 1, an undersized lot. The board determined that the lot was grandfathered, and issued a special permit to build, subject to certain conditions, including a request that Giovanella obtain an order of conditions from the commission to ensure that all requirements of the wetlands protection bylaw would be satisfied. Giovanella does not appeal the special permit and its attendant conditions.

He proceeded to file with the commission a notice of intent to build a house on lot 1. The commission held hearings on April 9, 2001, to discuss the impact of construction on the wetlands buffer zone within lot 1. Robert Gemma, Giovanella's civil engineer, appeared at the hearing to discuss the plans he had prepared for construction of a house on the lot. Construction would encroach on the buffer zone temporarily, although it would not encroach on the wetland itself. The completed house would not encroach on the buffer zone. Gemma told the commission that he could not move construction any further from the buffer zone, and that to deny the plan he presented would deny use of the whole property. On April 23, 2001, in response to the commission's concerns

with the plan, Gemma presented a second plan that incorporated mitigation measures designed to counteract any damage done to the wetlands during construction. On May 7, 2001, citing concerns with pollution and loss of wildlife habitat resulting from the disturbance during construction, the commission denied Giovanella's application for an order of conditions.

On June 19, 2002, more than one year after the commission had rejected his application for an order of conditions, Giovanella sold lot 2 for $319,900. While lot 2 was on the market, at least one person expressed interest in buying both lots 1 and 2 together. Nevertheless, Giovanella decided to sell lot 2 separately in the hopes of some day being able to build on lot 1. After the sale of lot 2 Giovanella hired an appraiser who concluded that by itself, lot 1 had no value.[3]

2. Ripeness. It is necessary to begin with a discussion of ripeness. A regulatory takings case becomes ripe for adjudication only after two requirements are satisfied. First, an owner must allow the responsible government entity to reach "a final decision regarding the application of the regulation to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985). Second, an owner must exhaust available State remedies before seeking relief under Federal

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[3] Giovanella's appraiser determined that lot 1 might have had some value to an abutter were it not for the tax liability that the town imposed. The tax liability was based on the town assessor's determination that lot 1 was developable. Of course, the town may not continue to tax lot 1 as developable land while simultaneously denying any opportunity to build on it. The appraiser concluded that should lot 1 be reassessed as an undevelopable lot, it would have a value of between $3,000 and $8,000 to an abutter.

law. *Id.* at 194. We conclude that the commission did reach a final decision regarding Giovanella's land. During the proceedings in front of the commission, Gemma followed his initial plan with a revised plan that attempted to satisfy the commission's requirements. He also told the commission that the house could not be moved any further from the buffer zone. After the commission rejected Gemma's second plan, and after Gemma explained that the plans provided the only possible use of the property, the commission had an opportunity "to exercise [its] full discretion" as a land-use authority. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001). It used that discretion to reject Giovanella's plan.

We also conclude that Giovanella has exhausted his available State remedies. He followed the commission's rejection with an appeal to the Department of Environmental Protection and he sent a letter to the chairman of the commission seeking reconsideration of the proposal. There were no other administrative remedies provided for in the wetlands protection bylaw or in the State wetlands protection act that authorized the bylaw. *See* G.L. c. 131, § 40. Some Federal courts have required litigants to pursue an "inverse condemnation" proceeding under State law before considering State remedies exhausted. *See Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 93 (1st Cir.), *cert. denied*, 540 U.S. 1090, 124 S. Ct. 962, 157 L.Ed.2d 795 (2003); *Gilbert v. Cambridge*, 932 F.2d 51, 65 (1st Cir.), *cert. denied*, 502 U.S. 866, 112 S. Ct. 192, 116 L.Ed.2d 153 (1991). In this case, an inverse condemnation claim would take the same form as the claim with which we are presented here. We see no reason to require Giovanella to make his claims first under the heading of "inverse condemnation" before considering the identical claim under the heading "regulatory taking."

3. Regulatory takings law. The Fifth Amendment to the United States Constitution, made applicable to the States

through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." This protection is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L.Ed.2d 1554 (1960).

Giovanella argues that the burdens placed on his land by the town's wetlands protection bylaw are so onerous as to require compensation under the takings clause. The United States Supreme Court has recognized this form of "regulatory takings" claim since its 1922 decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L.Ed. 322 (1922), in which Justice Holmes laid out his "storied but cryptic formulation, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L.Ed.2d 876 (2005), quoting *Pennsylvania Coal Co. v. Mahon*, *supra* at 415.

Identifying when a regulation has gone "too far" is a fact sensitive inquiry. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326, 122 S. Ct. 1465, 152 L.Ed.2d 517 (2002); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123-124, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978). The Supreme Court has explained that there is no "set formula" for when compensation should be made, but that the determination rests on "the particular circumstances" in each case after "an essentially ad hoc, factual inquir[y]." *See Penn Cent. Transp. Co. v. City of N.Y.*, *supra* at 124. In *Penn Cent. Transp. Co. v. City of N.Y.*, *supra*, the Court provided three factors to guide this inquiry: the extent to which the regulation interferes with the owner's distinct investment-backed expectations; the economic impact of the regulation; and the character of the government action. These

three factors have served as the principle guidelines for regulatory takings claims. *Lingle v. Chevron U.S.A. Inc., supra* at 539. They are designed to measure the "severity of the burden that government imposes upon private property rights." *Id.* at 539.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992), the Court established a limited exception to the use of the *Penn Central* factors in the "extraordinary circumstance when no productive or economically beneficial use of land is permitted" (emphasis in original). A regulation that causes an owner to lose all economically beneficial use of a piece of property is a taking per se. *Id.* at 1019. The *Lucas* categorical rule is limited to those "relatively rare situations" in which the regulation causes an owner to "sacrifice *all* economically beneficial uses" (emphasis in original). *Id.* at 1018, 1019. The Court has said that the *Lucas* rule would not apply even if "the diminution in value were 95% instead of 100%." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, supra* at 330.

In order to measure the economic impact of a regulation under either the *Lucas* or *Penn Central* decisions, we must first define the unit of property on which that impact is to be measured. We then compare the value of that property before and after the alleged taking. The heart of both tests becomes defining the unit of property at issue, often called the "relevant parcel." When a court considers a large piece of land of which only a small portion has lost value due to regulation, it is less likely to conclude that a taking has occurred. If a court considers a smaller parcel of land, most of which has been affected by a regulation, then the economic impact is more likely to appear large enough to constitute a taking.

This has come to be known as the "denominator problem," and it has proved to be a hard problem to solve. The

denominator problem has become an even more critical issue since the creation of the *Lucas* categorical rule. If a landowner is able to define the "relevant parcel" as only that part of land rendered valueless due to regulation, then the owner is automatically entitled to compensation for the value of that land. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181-1182 (Fed. Cir. 1994) (severing twelve and one-half affected acres from larger 250-acre parcel and finding categorical taking). At the same time, the benefits of an easily applied, bright-line rule are lost because the *Lucas* categorical rule "does not make clear the 'property interest' against which the loss of value is to be measured." *Lucas v. South Carolina Coastal Council*, *supra* at 1016 n.7.

The Supreme Court has provided only minimal guidance for resolving the denominator problem. It has stressed that we are to use the "parcel as a whole" for a takings analysis. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, *supra* at 327; *Penn Cent. Transp. Co. v. City of N.Y.*, *supra* at 130-131. Repeated admonitions to use the "parcel as whole," however, do little to define the contours of that whole parcel in any particular case.

4. Defining the denominator. Definition of the relevant parcel, like the rest of the regulatory takings law, is a fact sensitive inquiry. *See Loveladies Harbor, Inc. v. United States*, *supra* at 1181 ("Our precedent displays a flexible approach, designed to account for factual nuances"); *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991) (listing factors contributing to defining relevant parcel); *K & K Constr., Inc. v. Department of Natural Resources*, 456 Mich. 570, 580, 575 N.W.2d 531, *cert. denied*, 525 U.S. 819, 119 S. Ct. 60, 142 L.Ed.2d 47 (1998) ("Determining the size of the denominator parcel is inherently a factual inquiry"). To determine the extent of the unit of property to be scrutinized under a regulatory takings analysis, courts look to those factors that "identify the parcel as

realistically and fairly as possible, given the entire factual and regulatory environment." *Ciampitti v. United States*, *supra* at 319.

The intuitive starting point for determining the boundary of the property under a takings clause analysis is to consider as one unit all contiguous property held by the same owner at the time the taking occurred. *See*, *e.g.*, *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir.), *cert. denied*, 528 U.S. 951, 120 S. Ct. 373, 145 L.Ed.2d 291 (1999) (declining to sever contiguous parcels, one submerged and another above ground); *American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364, 372 (9th Cir. 1981) (considering contiguous parcels one unit unless landowner met burden showing that development plans for each would be zoned differently); *Ciampitti v. United States*, *supra* at 320 (combining noncontiguous property in relevant parcel where intervening linking lots also owned by same developer); *K & K Constr., Inc. v. Department of Natural Resources*, *supra* at 581, 575 N.W.2d 531 ("contiguity and common ownership create a common thread tying these three parcels together for the purposes of the taking analysis"); *Bevan v. Brandon Township*, 438 Mich. 385, 395-396, 475 N.W.2d 37, *amended* 439 Mich. 1202, 475 N.W.2d 37 (1991), *cert. denied*, 502 U.S. 1060, 112 S. Ct. 941, 117 L.Ed.2d 111 (1992) (considering contiguous lots under common ownership "as a whole" for takings analysis); *Zealy v. Waukesha*, 201 Wis.2d 365, 380, 548 N.W.2d 528 (1995) (declaring relevant parcel "clearly identified" as 10.4 contiguous acres owned by plaintiff). Following this logic, courts often begin by treating noncontiguous parcels or contiguous parcels with separate owners as separate units. *See*, *e.g.*, *Gove v. Zoning Bd. of Appeals of Chatham*, 444 Mass. 754, 762-763, 831 N.E.2d 865 (2005) (beginning analysis with individual lot before suggesting inclusion of noncontiguous property); *Lopes v. Peabody*, 417 Mass. 299, 300-301, 629 N.E.2d 1312 (1994) (considering one lot in takings analysis but

not noncontiguous parcels purchased at same time); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381, *aff'd on rehearing*, 231 F.3d 1354 (Fed. Cir. 2000) (severing fifty acres from larger 261-acre parcel across road in part because property was physically remote); *Coeur D'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310, 320 (Idaho 2006) (severing two parcels separated by road and separately owned).

Courts have considered a wide array of other factors beyond contiguous commonly-owned parcels, including: whether the property is divided by a road, *see Palm Beach Isles Assocs. v. United States*, *supra* at 1381 (describing property on either side of road as physically remote); *Coeur D'Alene v. Simpson*, *supra* at 323 (finding presence of road not determinative, but "one factor to consider"); whether property was acquired at the same time, *see FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 681, 689, 673 N.E.2d 61 (1996) (treating as one unit all lots purchased within same subdivision on same date); *Ciampitti v. United States*, *supra* at 318-319 (finding noncontiguous property acquired on same date to be one parcel); whether the purchase and financing of parcels were linked, *see Forest Props., Inc. v. United States*, *supra* at 1365 (treating two parcels as one unit in part because option to purchase lake-bottom land could be exercised only by owner of adjacent uplands); *Ciampitti v. United States*, *supra* at 319, 320 (treating two noncontiguous parcels as one in part because "inextricably linked in terms of purchase and financing"); the timing of development, *see Palm Beach Isles Assocs. v. United States*, *supra* at 1381 (severing contiguous property where development was temporally remote from larger parcel); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (excluding contiguous land developed and sold before enactment of regulation); whether the land is put to the same use or different uses, *see id.* at 1181-1182 (severing conservation land from land intended for residential

development); whether the owner intended to or actually did use the property as one economic unit, *see Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005) (including property because "appellants themselves regarded the 2,280-acre parcel as a single economic unit"); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1346 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1188, 125 S. Ct. 1406, 161 L.Ed.2d 191 (2005) (combining contiguous leases even though purchased at different times when part of "one unified mining plan"); *Forest Props., Inc. v. United States*, *supra* at 1365 (considering two parcels as one unit when treated as "single integrated project . . . comprising the two tracts"); *K & K Constr., Inc. v. Department of Natural Resources*, 456 Mich. 570, 582, 575 N.W.2d 531, *cert. denied*, 525 U.S. 819, 119 S. Ct. 60, 142 L.Ed.2d 47 (1998) (combining parcels in part because owners "forged a connection between parcels . . . through the proposed development scheme and permit applications"); and the treatment of the property under State law, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992) (proposing solution to denominator problem according to "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land"); *Coeur D'Alene v. Simpson*, *supra* at 323 (considering separated or unified tax treatment by town when severing).

We conclude that the extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel. Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property. In addition to identifying the unit of property "as realistically and fairly as possible," *Ciampitti v. United States*, 22 Cl. Ct. 310, 319 (1991), contiguity is also the most easily measured of the many factors courts have used for this inquiry.

Even so, definition of the relevant parcel is a fact sensitive inquiry, and we do not propose a bright-line rule here. This presumption in favor of contiguity may be overcome to either increase or decrease the size of the parcel by the application of additional factors, including those described above. For example, a relevant parcel might be increased to include noncontiguous land used for a single unified economic purpose, as in the case of one business that uses several noncontiguous buildings scattered throughout a city block. *See Gove v. Zoning Bd. of Appeals of Chatham*, 444 Mass. 754, 762-763 & n.15, 831 N.E.2d 865 (2005) (suggesting inclusion in relevant parcel of all property previously owned by one family and used as seaside resort). Similarly, a parcel might be severed from contiguous land where an owner proposes truly different uses for separate portions, or shows that the property is treated as separate, distinct economic units. *See Loveladies Harbor, Inc. v. United States*, *supra* at 1181 (severing land intended for residential development from conservation land promised to State).

An owner's treatment of property as a distinct economic unit is the most significant factor to consider in overcoming the presumption in favor of contiguous property. Occasionally, evidence of use as an economic unit involves ongoing established uses. More often, though, courts are presented with an owner's assertion that the intended use was to divide property into separate economic units. Concern that the introduction of such subjective factors would "increase the difficulty of an already complex inquiry" has led at least one jurisdiction to reject the use of any factor that relies on the owner's intended use rather than the owner's actual use. *See Zealy v. Waukesha*, 201 Wis.2d 365, 377-378, 548 N.W.2d 528 (1995). Nevertheless, we consider an owner's intended use to be an important factor when deciding whether property should be protected as a distinct unit under the takings clause. *See* Michelman, *Property, Utility, and Fairness: Comments on the*

Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1232 (1967) (proposing denominator defined by property "identified by the owner" as unit).

Treatment of the property under State or local law is a relevant factor, but one with limited weight. Our reliance on contiguous property minimizes the significance of lot lines in defining the boundaries of the denominator. Separate addresses or tax treatment as separate lots similarly carries little weight. Treatment under State law may play a larger role in cases of "conceptual severance," where individual uses of land are identified and protected under State law, and an owner attempts to recover compensation for the loss of the use based on that protection.[4] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992) (noting that background principles of State nuisance law permit States to proscribe particular uses without compensation); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 43 S. Ct. 158, 67 L.Ed. 322 (1922) (severing interest in coal in part because recognized as separate estate under State law). *But see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500, 107 S. Ct. 1232, 94 L.Ed.2d 472 (1987) (declining to sever interest in coal based merely on "legalistic distinction[ ]" of State recognition of "support estate"); *Seiber v. United States*, 364 F.3d 1356, 1369 (Fed. Cir.), *cert. denied*, 543 U.S. 873, 125 S. Ct. 113, 160 L.Ed.2d 122 (2004) (declining to use State

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[4] To allow separate regulatory treatment under State law to sever contiguous property would isolate only the regulated property in nearly all instances, thus practically ensuring compensation for every regulatory imposition. The United States Supreme Court has rejected that approach, noting that "defining the property interest taken in terms of the very regulation being challenged is circular." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331, 122 S. Ct. 1465, 152 L.Ed.2d 517 (2002).

law to define relevant parcel of timberland when owners argued State law protects property interest in individual trees). We are not here faced with such an argument, so we do not consider the treatment of Giovanella's property under State law to be of particular significance.

While few courts explicitly employ this presumption in favor of contiguous commonly-owned property, we believe that the analysis used by many courts follows this pattern. Instead of a continued attempt at balancing undifferentiated factors, or a bright-line rule, we consider it a fair and practical approach to emphasize the importance of contiguous commonly-owned property.

5. Giovanella's claim. (a) The denominator. A judge in the Superior Court denied Giovanella's motion for summary judgment and concluded that the commission's denial was not a taking. Summary judgment was later granted in favor of the commission based on the earlier decision denying Giovanella's motion. In that opinion, the judge used a relevant parcel that included both lot 1 and lot 2, and considered Giovanella's claims under both the multifactor *Penn Central* analysis, *see Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123-124, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978), and the *Lucas* categorical rule, *see Lucas v. South Carolina Coastal Council*, *supra* at 1017. With respect to the *Lucas* categorical rule, the judge concluded that Giovanella had not lost all economically beneficial use of his land because he had sold lot 2 for a profit. Under the *Penn Central* analysis, the judge concluded that any adverse economic impact on lot 1 was in part the result of Giovanella's poor business decision to sell lots 1 and 2 separately.

When reviewing the grant of summary judgment to the commission we ask whether, when viewed in the light most favorable to Giovanella, the evidence presented would permit

a finding that a taking has occurred. If not, the commission is entitled to a judgment as a matter of law. *See Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120, 571 N.E.2d 357 (1991), citing Mass. R. Civ. P. 56(c), 365 Mass. 824 (1974).

We begin our denominator inquiry with the presumption that Giovanella's two contiguous lots are one unit of property for purposes of the takings analysis. We next look to additional factors to determine whether there is sufficient evidence to overcome this presumption. These factors are designed to identify the property on which the impact of the regulation is to be measured. Giovanella does not make a facial challenge to the bylaw, but he challenges it as it was applied to his land. These factors should therefore be examined with respect to the time of the bylaw's impact, when the commission rejected his request for an order of conditions.

Giovanella argues that we should sever lot 1 from lot 2 because lot 1 has economically viable uses, and because he had no common development scheme connecting the two. The economic viability of land does not define its boundaries for purposes of the takings clause. Neither are two contiguous units of property severed merely because of the absence of a common development scheme. In order to overcome the presumption that lots 1 and 2 should be treated together as one unit, Giovanella must present some affirmative evidence of his separate treatment of the two lots.

In considering each of the factors in turn, we conclude that Giovanella has presented insufficient evidence to sever the two parcels. They were purchased at the same time, for a lump sum, as part of one transaction. There is no evidence that they were separately financed. The separate addresses, tax treatment, and lot lines are of minimal significance, and by themselves do not provide enough evidence of his separate treatment of the contiguous lots. They are not separated by a road. Both lots are

intended for single family residential use. Finally, and most importantly, he has not shown that he planned to or actually did treat them as separate economic units. Property intended for residential development by a single owner has been considered as one economic unit, and we see no reason to depart from that treatment here. *See Zanghi v. Board of Appeals of Bedford*, 61 Mass. App. Ct. 82, 85-86, 807 N.E.2d 221 (2004); *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 681, 689, 673 N.E.2d 61 (1996).

There may be circumstances in which neighboring lots should be considered separately under the takings clause, as when an owner can show separate business plans or financing for the two lots, or when they are developed for substantially different uses. In this case, Giovanella has provided no evidence showing that he treated his lots as two distinct economic units. He has only pointed to the absence of evidence showing that he treated them as one unit. It is not the commission's burden to show that the lots were treated as one unit under a "common development scheme." Rather, it is Giovanella's burden to show that he intended to, or actually did, treat them separately. Because he failed to produce evidence sufficient to show that they should be severed, we treat the two lots as one.

(b) Multifactor Penn Central analysis. It is clear, and Giovanella does not contest, that considering lots 1 and 2 together forecloses any compensation under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992). He was able to sell lot 2 for $319,900, an amount which is clearly more than a "token interest." *See Palazzolo v. Rhode Island*, 533 U.S. 606, 631, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001). Because the land was not rendered economically valueless, there can be no categorical taking. We proceed to his second argument that, even if the relevant parcel includes lots 1 and 2, the judge erred

in the application of the *Penn Central* factors. We consider each of the three factors in turn.

The judge concluded that the bylaw did not interfere with Giovanella's reasonable investment-backed expectations because he could have had no expectation of building on an undersized lot. This was error. The town's zoning laws did limit new home construction to 30,000 square foot lots, but Giovanella's neighborhood was made up primarily of lots no bigger than lot 1 (17,490 square feet). A person in Giovanella's situation may well have relied on his ability to build on lot 1 based on its similarity to the surrounding lots on which homes had already been built, or based on the availability of special permits for preexisting nonconforming lots.

Nevertheless, the wetlands protection bylaw did not impermissibly interfere with Giovanella's reasonable investment-backed expectations. The only financial investment he made in the property was the $130,000 he paid for both lots. This amount was more than recovered when he sold lot 2, after the order of conditions was denied, for $319,900. Although the judge erred in holding that Giovanella could not have relied on his ability to build on an undersized lot, it appears that he did not rely on his ability to build on lot 1 because he did not invest any money that relied on the separate development of lot 1. A takings claim is not defeated "simply on account of [an owner's] lack of a personal financial investment." *Gove v. Zoning Bd. of Appeals of Chatham*, 444 Mass. 754, 766, 831 N.E.2d 865 (2005) (finding no interference with reasonable investment-backed expectations where owner's lack of investment in inherited property implied no reasonable expectation of ability to develop). But Giovanella's failure to show any substantial personal financial investment in the development of lot 1 "emphasizes [his] inability to demonstrate that [he] ever had any *reasonable* expectation" of building a

house on that lot (emphasis in original). *See Gove v. Zoning Bd. of Appeals of Chatham*, *supra*.

When lots 1 and 2 are treated as one parcel, it becomes clear that the economic impact of the wetlands protection bylaw did not rise to the level of a taking. To evaluate the economic impact of the bylaw, we compare the value of Giovanella's land before and after the application for an order of conditions was denied. Before the denial the town assessed lot 1 as a developable lot worth $132,800. Giovanella has presented no evidence of the separate value of lot 2 before the denial. However, even assuming that the sale of lot 2 in 2002 for $319,900 accurately reflects the value of that lot in 1999, and the combined predenial value of the lots was $452,700, the action of the commission did not constitute a taking. With the value of lot 1 reduced to zero after the denial, the value of the entire property was reduced to $319,900. The economic impact of the action of the commission resulted in a decrease in the value of Giovanella's property from $452,700 to $319,900, a decrease of twenty-nine per cent. This decrease is not significant enough to rise to the level of a taking. *See Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1188, 125 S. Ct. 1406, 161 L.Ed.2d 191 (2005) (finding no taking after decreases in value of seventy-eight per cent and ninety-two per cent on two combined lots); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1178 (Fed. Cir. 1994) (finding categorical taking after ninety-nine per cent diminution in value, from $2,658,000 to $12,500); *Ciampitti v. United States*, 22 Cl. Ct. 310, 320 & n.5 (1991) (finding no taking after decrease in value of twenty-six per cent, from $19 million to $14 million).

Finally, the character of the government action does not support the conclusion that application of the bylaw was a taking. The most straightforward analysis, and the one the judge applied, is whether the character of the government action

is like a physical invasion. *See Leonard v. Brimfield*, 423 Mass. 152, 156, 666 N.E.2d 1300, *cert. denied*, 519 U.S. 1028 (1996); *Zanghi v. Board of Appeals of Bedford*, 61 Mass. App. Ct. 82, 90, 807 N.E.2d 221 (2004); *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 681, 695, 673 N.E.2d 61 (1996). The Supreme Court also has considered whether a regulation unfairly singles out the owner. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 537, 118 S. Ct. 2131, 141 L.Ed.2d 451 (1998). Other courts have looked at whether the government regulation is limited to mitigating harms or nuisances. Such regulations typically do not require compensation. *Gove v. Zoning Bd. of Appeals of Chatham*, *supra* at 767, 831 N.E.2d 865 (noting that regulations that mitigate harm do not typically require compensation); *Appolo Fuels, Inc. v. United States*, *supra* at 1351 (finding no taking where government action was "designed to protect health and safety"). Of course, many government actions that do extend beyond nuisance or harm prevention do not result in a taking. The character of government action is less likely to result in a taking when it is limited to nuisance prevention, but this factor provides no guidance for analyzing regulations that extend beyond nuisance prevention. *See Forest Props., Inc. v. United States*, 177 F.3d 1360, 1366 (Fed. Cir.), *cert. denied*, 528 U.S. 951, 120 S. Ct. 373, 145 L.Ed.2d 291 (1999) (finding character of government action had no impact where action was not limited to preventing nuisance).

No matter how the character of the commission's action is analyzed, application of the bylaw to Giovanella's land was not a taking. The limitations imposed by the town's wetlands protection bylaw are not like a physical invasion, nor does the bylaw unfairly single out Giovanella. Even if the bylaw extends beyond preventing harms or nuisance, the character of the commission's denial would have no impact on the case. Giovanella has failed to demonstrate any reasonable reliance on his ability to build a home on lot 1, or to show sufficient

economic losses resulting from the denial of his application. As a result, neither justice nor fairness entitle him to compensation for the impositions of the bylaw.

Judgment affirmed.

Appendix B-1

SUPERIOR COURT OF MASSACHUSETTS

John M. GIOVANELLA,	)	No. 024083
	)	
v.	)	Filed
	)	Dec. 30, 2004
TOWN OF ASHLAND CONSERVATION COMMISSION.	)	

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

S. JANE HAGGERTY, Justice.

INTRODUCTION

The plaintiff, John M. Giovanella ("Giovanella"), brought this suit against the defendant, Town of Ashland Conservation Commission ("Commission"), alleging that the defendant wrongfully denied his application for an Order of Conditions. The denial of the order prevented the plaintiff from building a house on a lot that contained wetlands. This case is presently before the court on Giovanella's Motion for Summary Judgment. The plaintiff asks the court to order the Commission to issue an order of conditions that will allow him to build upon his land, or in the alternative, to find that the Commission's action under the Ashland Wetlands Protection Bylaws constitute a regulatory taking for which compensation is due. For the reasons detailed herein, the motion is DENIED.

Appendix B-2

BACKGROUND

The following facts are undisputed for purposes of this Motion for Summary Judgment.

On March 31, 1999, the plaintiff purchased adjoining lots of land, lots 1 and 2, under one deed, at 25 Pine Hill Road, Ashland, MA. At the time of purchase, there was a single-family home on lot 2. Lot 1 was undeveloped. The plaintiff intended to erect a single-family home on lot 1. However, because lot 1 was 15,000 square feet smaller than the then current zoning requirements for single-family homes, the plaintiff needed a special permit from the Ashland Zoning Board. On June 8, 2000, the Ashland Zoning Board granted the plaintiff a special permit to construct a residential home on lot 1. However, because lot 1 contained 6,000 square feet of wetlands, the Ashland Zoning Board granted the special permit contingent upon the approval of the Commission.

About seven months after the plaintiff purchased 25 Pine Hill Road, but before the plaintiff applied for a building permit for lot 1, the Town of Ashland passed the Ashland Wetlands Protection Bylaws, Chapter 280 ("the Bylaws"). Section 280-1 prohibits work or disturbance within a buffer zone, which is a twenty-five foot protection area surrounding the wetlands, unless an applicant can show that the "work to be performed sufficiently protects or enhances wetland interests." The Commission is responsible for enforcing the Bylaws.

On March 22, 2001, the plaintiff filed with the Commission a notice of intent to build along with his proposed site plan. The Commission held a hearing on the plaintiff's proposal on April 9, 2001. The plaintiff explained to the Commission that if he complied with the Ashland zoning requirement of a thirty-foot setback from the rear property line, and the twenty-five foot wetland buffer zone, he would only be

left with fifteen square feet to build a house. As an alternative, the plaintiff proposed the construction of a twenty-six foot wide house, which would require a variance to the thirty-foot setback, and a grading of land that would encroach fourteen feet into the wetland buffer zone. The plaintiff argued that there were no other feasible construction alternatives.

After the Commission heard testimony from the plaintiff, the plaintiff's expert, the plaintiff's neighbors, and other interested parties, the Commission members performed a site visit to lot 1. During the visit, the members observed that lot 1 contained a substantial stream, a forested wetland and specific varieties of wetland species, trees and shrubs. On May 14, 2001, the Commission denied the plaintiff an Order of Conditions because the plaintiff had failed to provide sufficient evidence that the construction work could be performed within the buffer zone in a manner that sufficiently protected or enhanced the wetland interests as required by the wetland bylaws. In addition, the Commission listed the specific wetland interests that would be impacted by the project which included: 1) protection of groundwater supply; 2) flood control; 3) storm damage prevention; 4) prevention of pollution; 5) protection of fisheries; and protection of wildlife habitat.

On June 19, 2002, the plaintiff sold lot 2 for $319,000. Prior to the sale, the plaintiff was informed by his real estate broker that someone was potentially interested in purchasing lots 1 and 2 together. However, the plaintiff told his broker that he was not interested in selling the lots together because he "just had faith that one day [he] would be able to build on lot 1." The value of lot 1 has recently been appraised at $0.00.

The plaintiff commenced this action on May 31, 2001, in the District Court. The plaintiff then removed the case to the Superior Court on September 27, 2002. On August 7, 2004, the plaintiff filed this motion for Summary Judgment.

Appendix B-4

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1982); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989).

The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

The first issue is whether the Commission based its denial of the plaintiff's request for an Order of Conditions on substantial evidence. The second issue is if the Commission's decision was valid; did its denial of the plaintiff's proposal constitute a regulatory taking.

A. The Order of Conditions

This Court has jurisdiction to review the Commission's denial of the plaintiff's request for an Order of Conditions pursuant to G.L.C. 249, § 4. *FIC Homes of Blackstone v. Conservation Com'n of Blackstone*, 41 Mass. App. Ct. 681, 684 (1996), *rev. den.*, 424 Mass. 1104 (1997). When a court is asked to review a conservation commission's grant or denial of

an Order of Conditions, the substantial evidence standard applies. *Lovequist v. Conservation Comm'n of Dennis*, 379 Mass. 7, 17 (1979). In order for the Commission's decision to meet the substantial evidence standard, this Court must conclude that the evidence is such that a reasonable mind would accept it as adequate to support the Commissions' conclusion. *Doherty v. Retirement Board of Medford*, 425 Mass. 130, 135 (1997). A decision based on facts unsupported by substantial evidence is arbitrary and capricious. *Lurie v. Conservation Com'n of Barnstable*, 54 Mass. App. Ct. 1115 (2002).

In evaluating whether the Commission's denial of the Order of Conditions was based upon substantial evidence, the language of the Wetlands Bylaw under which the Commission's decision was made is the starting point. Section 280-1 of the Bylaws governs construction in or near wetland resources. Section 280-1 states that "[n]o work or disturbance, including but not limited to grading, vegetation removal or disturbance, shall be permitted within twenty-five (25) feet of any Bordering Vegetated Wetland or Bank area, unless the applicant provides information and evidence deemed satisfactory by the Commission that the work to be performed *sufficiently protects or enhances wetland interests*." (Emphasis added.) The Bylaws allows for a buffer zone to protect the integrity of the adjacent resource area.

Section 280-1 of the Bylaws places the burden on an applicant who wants to build within the twenty-five foot buffer zone to demonstrate that the proposed construction will "sufficiently protect or enhance wetland interests." The plaintiff has not cited to any evidence in the administrative record demonstrating that he met this burden when he appeared before the Commission. His failure to provide the Commission with a plan of how he would "sufficiently protect or enhance the wetland interests," despite the fourteen feet intrusion into the wetland buffer zone, left the Commission with no

alternative but to deny his proposal.[1] The plaintiff purports that the Commission based its denial of his proposal on unsubstantiated evidence that his proposed building plan would injure the wetlands on lot 1.[2] However, the Commission correctly denied the plaintiff's requests for an Order of Conditions based on the fact that the plaintiff failed to meet his burden.

---

[1] The plaintiff's argument that the Commission's denial was improper because it relied on unsubstantiated evidence that his construction project would cause harm to the wetland area is premature. Even if this Court were to find that the Commission's statements that the building proposal would cause significant degradation, leaching of materials from lawns into the wetlands, and as proposed would have an unnecessary and unacceptable impact to the wetlands were based on insufficient evidence, the Commission still had a valid grounds to deny the plaintiff an Order of Conditions. The burden was on the plaintiff, not the Commission, to convince the Commission that he could invade the wetlands buffer zone while still protecting or enhancing the wetlands area. He failed to do so. Therefore, it is unnecessary for the court to address whether these other findings were accurate or based on substantiated evidence.

[2] The plaintiff also urges this Court to consider the circumstances surrounding the Commission's grant of an order for property located on Raymond Way as evidence of the Commission's inconsistent application of the wetlands bylaw. However, the Commission's decision in other cases bears no relevance to this case.

B. Regulatory Taking

When deciding whether a regulatory action results in a taking of property, courts review the facts under a two-part analysis. First, courts consider whether the regulation prohibits all economically viable use of the plaintiff's land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-32 (1992). If a total loss is not found, then the courts will proceed with a multi-factor analysis, which was developed prior to the *Lucas* decision, to determine if the regulation still deprives the plaintiff of substantial economic interest to constitute a taking. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

1. Lucas Analysis

A per se taking occurs if the regulation in question deprives the plaintiff of all economically beneficial use of his property. *Lucas*, 505 U.S. at 1027. A critical element in determining whether a plaintiff has been deprived of all economically beneficial use of his property is defining the unit of property in order to assess lost value. *FIC Homes*, 41 Mass. App. Ct at 688, citing *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987). "When determining whether property owners have been deprived of all of the economic value of their property, Massachusetts courts consider the regulation's effect on an entire parcel, rather than on individual segments." *Zanghi v. Board of Appeals of Bedford*, 61 Mass. App. Ct 82, 85 (2004).

In this case, the plaintiff argues that the Commission's actions under the Bylaws has caused a deprecation in the value of lot 1 to the point where he has been deprived of all economically beneficial use of his land. However, the Massachusetts courts do not evaluate the value of property by individual segments, but rather by the entire parcel. In *Zanghi*,

the plaintiff purchased a large parcel of land and subdivided it into eleven lots. *Id.* at 86. At the time of the action the plaintiff had developed and sold lots 33 and 34 for a substantial financial gain and was seeking to start the development of lot 36. *Id.* However, an existing wetlands bylaw prohibited the plaintiff from developing lot 36. *Id.* The plaintiff asked the court to find that because the application of the regulation to lot 36 deprived him of all economically beneficial use of his land he was entitled to compensation. *Id.*

In analyzing the plaintiff's taking claim, the court in *Zanghi* would not consider the value of lot 36 in isolation, but only in conjunction with the realized value of the entire parcel of land. *Id.* The court held that even though lot 36 had lost almost all of its value, the plaintiff had received substantial profits from the sale of lots 33 and 34, and hence, he had not been deprived of 100 percent economic loss of his parcel of land. *Id.*; *see also Leonard v. Town of Brimfield*, 423 Mass. 152 (1996) (where a regulation preventing the development of ten out of sixteen acres of land did not constitute severe economic impact); *FIC Homes*, 41 Mass. App. Ct. at 689 (where that economic impact was not severe where plaintiff purchased thirty-eight lots under one deed and a wetlands bylaw prohibited the development of one).

Similarly, this Court must consider the value of the plaintiff's entire parcel of land, not the value of lot 1 in isolation. In 1999 the plaintiff purchased lots 1 and 2 under one deed, for $130,000. Approximately one year after the Commission denied his request for an Order of Conditions the plaintiff sold lot 2 for $318,000 resulting in a $188,000 increase in the value of the plaintiff's overall investment. Because the plaintiff realized an economic gain on his parcel of land he was not deprived of all economically beneficial use of his parcel of land and, therefore, there was no per se taking.

2. Pre-*Lucas* Analysis

A court will preform a pre-*Lucas* analysis if it is determined that a plaintiff has suffered less than a total economic loss. *Zanghi*, 61 Mass. App. Ct. at 87. In doing so, courts consider the following interrelated factors: 1) the validity of the by-law as applied to the plaintiff's property; 2) the plaintiff's reasonable investment-backed expectations; 3) the economic impact on the plaintiff's property; and 4) the character of the governmental action. *FIC*, 41 Mass. App. Ct. at 688. This Court addresses each of these factors in turn.[3]

a. Validity of the Bylaws

The plaintiff carries the burden of demonstrating that the Bylaws, as applied to his property, does not substantially advance a legitimate state interest. *Lopes v. City of Peabody*, 417 Mass. 299, 307, n.13 (1994). The plaintiff in this case neither contests that the bylaws are serving and advancing a legitimate state interest, nor argues that the stream that runs through his property has been inaccurately identified as a wetland. It is well established that bylaws protecting a "variety of 'wetlands values' including . . . public and private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, water pollution prevention . . . and wildlife habitat" are legitimate State interests. *FIC*, 41 Mass. App. Ct. at 688 (citations omitted). Therefore, the Bylaws are valid regulations.

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[3] While the plaintiff only presents a per se takings argument to this Court, a pre-*Lucas* analysis is necessary to thoroughly review the plaintiff's takings claim.

b. Reasonable Investment-Back Expectations

Massachusetts courts have held that interference with investment-backed expectations rise to a level of regulatory taking when the expectations are "reasonable and predicated on existing conditions . . . not merely a unilateral expectation or an abstract need." *Leonard v. Brimfield*, 423 Mass. 152, 155 (1996). Some examples of unreasonable investment-backed expectations that the courts have found include: 1) purchasing property within a known floodplain and expecting to build residential homes; 2) expecting to build upon property that was governed by wetlands bylaws that prohibited construction at the time of purchase; and 3) purchasing land zoned for commercial use and expecting to build condominiums. *See Leonard*, 432 Mass. 152; *FIC* Homes, 41 Mass. App. Ct. 681; *Grasso v. City of New Bedford*, 55 Mass. App. Ct. 1116 (2002).

In the case at hand, the plaintiff knew at the time of purchase that lot 1 did not conform to existing zoning laws and that he would need a special zoning permit in order to develop lot 1. Any expectation that he would undoubtably be able to develop lot 1 was unreasonable. The Bylaws were enacted after the plaintiff purchased lots 1 and 2, and therefore would not be a factor in what his reasonable investment-backed expectations were at the time of purchase. Therefore, because he knew at the time of purchase that his ability to develop lot 1 was contingent upon the grant of a special zoning permit, he did not have a reasonable investment-backed expectation that he would be able to develop lot 1.

c. Economic Impact

A government regulation must have a severe economic impact on the plaintiff's property to be considered a taking. *Zanghi*, 61 Mass. App. Ct. at 89. A plaintiff has not suffered a severe economic impact when the land in question could still be

devoted to woodland, wetland, and recreational purposes, used as additional acreage for residential abutter's properties, or where the plaintiff's economic loss is buffered because the purchase price of the land accounts for the restrictive nature of the parcel's zoning class. *See FIC Homes*, 41 Mass. App. Ct. 681; *Grasso v. City of New Bedford*, 55 Mass. App. Ct. 1116 (2002).

In the present case, the plaintiff contends that lot 1 has lost all economic value because he cannot build on it, sell it to his neighbors, or otherwise use the land profitably. However, the plaintiff's property may still retain value as woodlands, wetlands, or used for recreational purposes. The plaintiff has presented no evidence that these uses are not feasible. Lot 1 could also be sold to the adjacent lot owners to increase their lot size and the value of their property. While the plaintiff contends that the adjacent lot owners have no incentive to purchase lot 1, he has not provided any evidence to this effect. In addition, the plaintiff and the previous owner of lot 1 knew that the lot did not conform to existing zoning laws and this should have been accounted for in the purchase price of the property.

It is also important to note that the Commission denied the plaintiff's request for an Order of Conditions more than a year before he sold lot 2. The plaintiff had knowledge before he sold lot 2 that he would not be able to build on lot 1, and that someone was interested in buying both lots together. However, because the plaintiff believed that he would someday be able to build on lot 1, despite evidence to the contrary, he proceeded to sell only lot 2. The plaintiff had the opportunity to realize financial gain on lot 1 by marketing lots 1 and 2 together, yet he chose otherwise. Regulatory taking law was not developed to compensate bad business decisions. For the aforementioned reasons, the plaintiff did not suffer severe economic harm.

d. Character of Governmental Action

The final factor this Court must consider is the character of the governmental action. "A taking may more readily be found when the interference with property can be characterized as a physical invasion by the government." *Leonard*, 423 Mass. at 156. In this case, because there was no physical invasion of the plaintiff's property, the character of the Commission's denial of an Order of Conditions does not indicate a taking of the property.

In considering all the interrelated factors of the pre-*Lucas* analysis, the plaintiff has not suffered a regulatory taking.

ORDER

For the foregoing reasons, it is hereby ORDERED that plaintiff Giovanella's motion for summary judgment is DENIED.

(2)

No. 06-972

Supreme Court, U.S.
FILED
FEB 15 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOHN M. GIOVANELLA,

Petitioner,

v.

TOWN OF ASHLAND
CONSERVATION COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

The Petitioner's formulation of the issue for review is misstated. The question that is presented in the Petition, taking into account the facts and circumstances of this case, is more accurately stated as follows:

Did the lower court engaged in an appropriate analysis regarding the relevant parcel for a takings claim, where the court's analysis began with a presumption of aggregation based on contiguous, commonly-owned parcels of real estate, and included consideration of multiple factors to rebut the presumption, including whether the parcels were acquired at the same time; whether the purchase and financing of the parcels were linked; the timing of development; whether the land is put to the same use; whether the owner intended to use the property as one economic unit; and the treatment of the property under State law?

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STATEMENT OF THE CASE

The Petitioner's statement of the facts contains significant inaccuracies. So that this Court has a complete view of the facts in this case, the following statement is presented.

A. Factual Background

On March 31, 1999, John M. Giovanella ("Petitioner") purchased land in the town of Ashland (the "Town") for $130,000. Pet. App. A-3. The property consisted of over 34,500 square feet, and had a wetland in the northwest corner and a single-family home on the southern portion. Pet. App. A-3.

About three to six months after purchasing the land, the Petitioner learned that a previous owner had divided the property into two lots. The lots were assessed separately for taxes and had different addresses. Pet. App. A-3. The single-family home was on Lot 2, while the wetlands was on Lot 1. Pet. App. A-3. After learning this information, the Petitioner decided to build a new house on Lot 1. Pet. App. A-3-4.

In December 1999, the town adopted a wetlands protection bylaw. Pet. App. A-4. When the Petitioner subsequently applied for a permit to build on Lot 1, the town's Zoning Board of Appeals granted a special permit, subject to the condition that the Petitioner obtain an order of conditions from the Town's Conservation Commission (the "Commission"). Pet. App. A-4.

The Petitioner filed with the Commission a notice of intent to build on Lot 1. Pet. App. A-4. The Commission

considered two different plans that the Petitioner presented. However, citing concerns with pollution and loss of wildlife habitat resulting from the disturbance during construction, the Commission denied the Petitioner's application for an order of conditions. Pet. App. A-4-5.

More than a year after the Commission had rejected his application for an order of conditions, the Petitioner sold Lot 2 for $319,000. Pet. App. A-5. During the time that Lot 2 was on the market, at least one individual expressed an interest in purchasing Lots 1 and 2 together. Pet. App. A-5. However, the Petitioner decided to sell Lot 2 separately, in the hopes of eventually being able to build on Lot 1. Pet. App. A-5.

After the sale of Lot 2, the Petitioner hired an appraiser, who concluded that by itself, Lot 1 had no value. Pet. App. A-5. The appraiser also concluded that Lot 1 would have value to an abutter were it not for the tax liability imposed by the Town. Pet. App. A-5 n.3. The tax liability was based on the Town assessor's determination that Lot 1 was developable. Pet. App. A-5 n.3. According to the Petitioner's appraiser, should Lot 1 be reassessed as an undevelopable lot, it would have a value of $3,000 to $8,000 to an abutter. Pet. App. A-5 n.3.

B. Judicial Proceedings

Following the Commission's denial of the Petitioner's application for an order of conditions, the Petitioner filed an appeal with the Massachusetts Superior Court, seeking an annulment of the Commission's decision, or damages for what he contended was a regulatory taking under the Fifth Amendment to the United States Constitution. The Superior Court upheld the Commission's decision, and

further held that the Petitioner's takings claim must fail because, using the contiguous, commonly-owned property as the relevant parcel, the Petitioner had failed to show sufficient economic harm.

The Petitioner appealed this ruling, and the Massachusetts Supreme Judicial Court granted his application for direct appellate review. The Supreme Judicial Court, noting that determining the bounds of the "relevant parcel" was a fact-intensive inquiry, affirmed the decision of the lower court, holding that it was appropriate to consider the Petitioner's contiguous, commonly-owned property as one unit. The decision of the Supreme Judicial Court is consistent with the takings analysis of this Court, the federal circuit courts, and the courts of other states.

REASONS FOR DENYING PETITION

The Petitioner contends that there is a conflict among the lower federal and state courts, noting that in some cases courts aggregate contiguous, commonly-owned property for the purpose of a takings analysis, while in other cases the courts do not. In fact, a review of the cases that the Petitioner cites reveals that the lower courts each engage in a consistent and case-specific, factual analysis when deciding these cases, and that the case-specific nature of a takings analysis explains the different outcomes.

Furthermore, even were this Court inclined to review the general issue that the Petitioner raises, this case is not the appropriate vehicle for such review. The facts of this case, wherein the Petitioner purchased property believing it to be one lot, with no intention of further development

and with no economically-backed plan to do so, and where the Petitioner could have sold the regulated portion of his property to an abutter for, according to his own appraiser, between $3,000 and $8,000, this does not present a compelling case for reviewing the issue of how to define the "relevant parcel."

For all of these reasons, the petition for certiorari should be denied.

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OR AMONG THE STATE COURTS

The Petitioner asserts that there is a conflict among the circuit courts and state courts regarding what the relevant parcel of property is for purposes of analyzing a regulatory taking claim. Contrary to the Petitioner's assertions, however, there is no such conflict among the circuits or state courts, nor with prior rulings of this Court. Indeed, a review of the cases that the Petitioner cites reveals remarkable consistency of analysis. The Petitioner's characterization appears to result from observing the varying outcomes that courts have reached regarding whether to aggregate contiguous, commonly-owned parcels of land. However, such differing outcomes are to be expected, because the inquiry calls for case-specific, factual determinations, pursuant to the guidelines articulated by this Court.

A. This Court's Takings Jurisprudence Establishes That Regulatory Takings Cases Require Case-Specific Factual Inquiries, Including The Identification Of The "Relevant Parcel"

This Court has consistently stated that regulatory takings cases require "complex factual assessments of the purposes and the economic effects of government actions." *Tahoe-Sierra Preservations Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002). The "test for regulatory taking requires [the Court] to compare the value that has been taken from the property with the value that remains in the property," thus requiring a determination of the relevant parcel of property, sometimes referred to as the "denominator" of the fraction. *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 497 (1987).

This Court has also made clear that there is no *per se* rule defining the relevant parcel simply as the property interest subject to the regulatory restriction: "defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every [restriction] would become a total ban. We have consistently rejected such an approach to the 'denominator' question." *Tahoe*, 535 U.S. at 331.

As this Court has stated, "in regulatory takings cases, we must focus on 'the parcel as a whole.'" *Id.* Takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Pennsylvania Central*

Transportation Co. v. City of New York, 438 U.S. 104, 130-31 (1978).

This Court's consistent position that a takings analysis focus on the "parcel as a whole" is mandated precisely because of the concern expressed in *Tahoe* above: to allow an owner to define the relevant parcel based on the challenged regulation will *always* result in the conclusion that there has been a taking. *Tahoe*, 535 U.S. at 331. Nonetheless, the Petitioner, through the Pacific Legal Foundation, seeks to have this Court reconsider the relevant parcel issue in hopes of persuading this Court to make the test exactly that. This would set a standard whereby the impact of a challenged regulation essentially define the relevant parcel. However, "not all regulations that affect private property require the government to purchase the land in order to regulate its permissible uses. Indeed, the government would quickly bankrupt itself if, every time it made a rule that affected private property rights, it had to purchase the property." *Machipongo Land and Coal Co. v. Commonwealth*, 799 A.2d 751, 763-764 (Pa.), *cert. denied*, 537 U.S. 1002 (2002), (citing *Keystone*, 480 U.S. at 491). As was noted by the Supreme Court of Colorado, in *Animas Valley Sand and Gravel, Inc. v. Board of County Commissioners*, 38 P.3d 59 (Colo. 2001): "Were we to accept [Petitioner's] position that a court should evaluate the effect of a regulation with respect to only one segment of the parcel, virtually any land use regulation would effect a taking if the landowner defined the relevant parcel small enough." *Id.* at 69.

Not only is this inadvisable because of the inevitable result that every challenged regulation under such an analysis would be a taking, but such a reexamination of the relevant parcel issue is simply unnecessary. This

Court's precedent provides clear guidance that the state courts and circuit courts of appeal have consistently applied. That precedent requires the relevant parcel be the "parcel as a whole" and that such determination be guided by a fact-sensitive inquiry into the nuances of each case.

The Court's reference to the "parcel as a whole" and the "property in its entirety" does not, of course, resolve the specific factual inquiry regarding what constitutes the whole parcel or the entire property. However, this language is part of the guidance this Court has provided for that inquiry. Expanding on these phrases, the Court has stated, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Keystone*, 480 U.S. at 497 (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

Significantly, this case-specific factual inquiry of the relevant parcel must be made with reference to the same factors upon which a takings claim is analyzed. The Court stated in *Penn Central*, 438 U.S. at 124:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

This Court stated in *Tahoe* that "[o]ur polestar . . . remains the principles set forth in *Penn Central* and the other cases that govern partial regulatory takings. Under

these cases, interference with investment-backed expectations is one of a number of factors that a court must examine." *Tahoe*, 535 U.S. at 336.

With this guidance, lower courts determine the relevant parcel by conducting case-specific inquiries that identify the relevant parcel that is most appropriate under the particular facts within the context of their examination of the regulation's economic effect on the landowner; the extent to which the regulation interferes with reasonable investment-backed expectations; and the character of the governmental action.

B. The Lower Courts Consistently Apply The Same Factors

1. The Federal Court Cases Cited By The Petitioner Are Not In Conflict

The Petitioner asserts that with regard to determining the relevant parcel, there is a conflict among the Circuits. No such conflict is present in these decisions, however, unless one assumes, contrary to common sense, that there must be a *per se* rule requiring aggregation or non-aggregation in every case, regardless of the specific facts involved. A case-by-case, factual analysis inherently presumes that some cases will properly result in aggregation and others not. The proper test of consistency is not whether aggregation does or does not occur in every case, but whether the courts have applied an appropriate, reasoned analysis to decide the issue. In fact, they have.

An examination of the Federal Circuit cases that the Petitioner cites reveals the basic framework for the case-by-case, fact-intensive inquiry in which each court dealing with a relevant parcel issue must engage. *Palm Beach*

Isles Assocs. v. United States, 208 F.3d 1374 (Fed Cir. 2000), *cert. denied*, 126 S. Ct. 348 (2005); *Forest Properties, Inc. v. Washington County*, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, 528 U.S. 951 (1999); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

In *Loveladies*, the plaintiff developer had purchased 250 acres in 1958, and thereafter developed or sold 199 of them. Subsequently, section 404 of the Clean Water Act was enacted. Fifty of the plaintiff's remaining undeveloped 51 acres were under water. Under the Act, the plaintiff was required to obtain permits from the State and from the Army Corps of Engineers to create landfill in order to develop that land. Plaintiff eventually agreed to a compromise with the State, by which only 12.5 of the 51 acres could be developed. The Corps of Engineers, however, denied a permit. Plaintiff brought a takings claim.

The *Loveladies* court rejected plaintiff's argument that there should be a bright-line rule that the relevant parcel is deemed to be limited to the parcel for which the permit was applied. Noting that "[o]ur precedent displays a flexible approach, designed to account for factual nuances," the court stated that "[t]hese factual nuances include consideration of the timing of the transfers in light of the developing regulatory environment." *Loveladies*, 28 F.3d at 1181. Examining the factual background, the court concluded that the 199 acres developed or sold before the regulatory restrictions existed would not be included in the relevant parcel. The court further concluded that the 38.5 acres that plaintiff had committed to the State in exchange for the approval to develop 12.5 acres also would not be included in the relevant parcel, because that land held no further value to the plaintiff. The court thus concluded that the remaining 12.5 acres was the relevant

parcel, and accepted the trial court's finding that without a permit its value was de minimus.

The Federal Circuit conducted a similar analysis in *Palm Beach Isles*, 208 F.3d 1374. The plaintiff bought 311.7 acres in 1956, of which 261 acres was "upland" property on one side of a road, whereas the remaining 50.7 acre parcel on the other side consisted of 1.4 acres of shoreline wetlands and 49.3 acres of submerged land. The two parcels were subject to different zoning requirements. In 1968, the plaintiff sold the upland property. Twenty years later, in 1988, the plaintiff sought permits to dredge and fill the submerged land. The State denied the permit, and plaintiff brought a taking claim. In determining the relevant parcel, the court noted, "As we said in *Loveladies Harbor*, '[o]ur precedent displays a flexible approach, designed to account for factual nuances.'" *Palm Beach Isles*, 208 F.3d at 1381 (quoting *Loveladies*, 28 F.3d at 1181). The court observed that plaintiff had never planned to develop the two parcels as a single unit, that the purchase and sale of the 261 acres occurred before the environmental restrictions were adopted, and that the development of the upland property "was physically and temporally remote from, and legally unconnected to, the 50.7 acres of wetlands and submerged lake bed." *Id.* at 1381. The court thus held that the relevant parcel was the 50.7 acres of wetlands and submerged lake bed.

Another Federal Circuit case cited by the Petitioner is *Forest Properties*, 177 F.3d 1360, in which the court applied the same case-specific analysis that can be seen in the *Loveladies* and *Palm Beach Isles* cases. *Id.* at 1365. The court said that the analysis "requires courts to focus on the expectations of the claimant with regard to the property," and "[w]here the developer treats legally separate parcels as

a single economic unit, together they may constitute the relevant parcel." *Id.* Here, the court said, it was understood from the beginning that "the two portions would be developed as a single unit." *Id.*

In support of his contention that there is a conflict among the circuit courts, the Petitioner erroneously asserts that the District of Columbia Circuit's decision in *District Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), is in conflict with the foregoing Federal Circuit decisions. In fact, this decision applies remarkably similar reasoning. In *District Intown Properties*, the plaintiff purchased in 1961 a property in the District of Columbia consisting of an apartment building and adjacent lawns. Unlike *Palm Beach Isles* and *Loveladies*, in *District Intown Properties*, the plaintiff made no immediate effort to develop, sell or separate any part of the property. Instead, 27 years later, the plaintiff subdivided the property into nine lots, one being the apartment building and the other eight being portions of the lawn. The plaintiff sought a permit to build townhouses on each of the eight lawn lots. Because the property was across the street from the National Zoo, the proposed development was subject to review by the District of Columbia Commission on Fine Arts. The Commission denied the permit, and the plaintiff brought a takings claim.

The plaintiff argued that the relevant parcel should be limited to the eight lawn parcels, for which a permit was sought, and should not include its contiguous existing apartment building. The plaintiff in *Loveladies* had similarly argued that the relevant parcel should be limited to the property for which the permit was requested, but the Federal Circuit rejected that argument in favor of a

case-specific, factual analysis. The District of Columbia Circuit did the same. *District Intown Properties*, 198 F.3d at 880.

In *District Intown Properties*, the district court concluded that the relevant parcel included the apartment lot as well as the lawn lots. On appeal, the circuit court agreed, acknowledging, with approval, the case-specific factual analysis the district court had applied:

> The District Court used several factors to determine the relevant parcel: the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot. An analysis focused on these factors is eminently sound and it mirrors the approach taken by other courts in regulatory takings cases.

Id. (internal citations omitted). The court further noted that the apartment and lawn property were spatially and functionally contiguous and had been treated by the plaintiff as a single indivisible property for more than 25 years.

Significantly, petitions for certiorari have been filed in three of the circuit court cases discussed above, and this Court has denied those petitions each time. *Palm Beach Isles*, 208 F.3d 1347, *cert. denied*, 126 S. Ct. 348 (2005); *District Intown Properties*, 198 F.3d 874, *cert. denied*, 531 U.S. 812 (2000); *Forest Properties*, 177 F.3d 1360, *cert. denied*, 528 U.S. 951 (1991). Although this Court's decision to deny a petition for certiorari does not elucidate the reasons for such denial, it is telling that each of these three circuit court cases involved courts conducting a case-based, factual analysis, examining the very same factors

that the Massachusetts Supreme Judicial Court examined below. Pet. App. A-11-12, A-16-17.

Other lower federal courts have applied a nearly identical analysis, evidencing that this Court has provided consistent and appropriate guidance regarding the factors to be considered in determining the relevant parcel. For example, in *American Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir. 1981), cited by the Petitioner as counter to the District of Columbia circuit, the court stated that in determining the relevant parcel, it would consider: "(1) physical contiguity; (2) unity of ownership; and (3) unity of use." *Id.* at 369. The court went on to note that "[t]hese criteria are not absolutely inflexible. They are working rules courts have adopted to do substantial justice in eminent domain proceedings." *Id.* The court then proceeded with its case-specific factual analysis. Similarly, in *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-319 (1991), the Court of Federal Claims discussed the determination of the relevant parcel in similar terms of case-specific factual analysis:

> Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of the remaining lands, the value of the remaining lands, and no doubt many others, would enter the calculus.

In summary, the circuit courts determine the relevant parcel by engaging in nearly identical case-specific factual analyses that is "designed to account for factual nuances." *Loveladies*, 28 F.3d at 1181. The Petitioner has failed to demonstrate that there is any conflict among the circuits.

2. The State Court Cases Cited By Petitioner Are Not In Conflict

The Petitioner's assertion that there is a conflict among the state courts regarding the determination of the relevant parcel is based on the same erroneous premise that different outcomes means an inconsistent analysis. As seen from the discussion of circuit court cases above, this assumption is faulty. The state court cases, like those of this Court and the federal circuit courts, routinely apply a case-specific factual analysis, as is reflected in the cases the Petitioner cites.

For example, citing to the various factual considerations set forth in *Ciampitti*, *supra*, the Supreme Court of Michigan has stated that "[d]etermining the size of the denominator parcel is inherently a factual inquiry." *K & K Construction, Inc. v. Dept. of Natural Resources*, 575 N.W.2d 531, 536 (Mich. 1998). A similar factual analysis was made in *Karam v. Dept. of Environmental Protection*, 705 A.2d 1221 (N.J. Super. 1998), *cert. denied*, 528 U.S. 814 (1999). There, the court noted that although contiguous commonly-owned land is often treated as a single parcel for takings analysis, factual examination can result in treating the property as separate parcels. The court cited various cases involving large tracts of property that had been segmented into smaller parcels for development at different times, where "either because of the configuration of the property or its history, the divided parcels [were] considered as separate and distinct entities or units." *Id.* at 1228. The court discussed various factual issues and concluded that, "*[r]ecognizing the fact sensitive question before us*, we are convinced that the adjoining upland and riparian lands must be considered a single property unit." *Id.* (emphasis added).

The Supreme Court of Ohio adopted the very same approach:

> Although contiguous tracts of property are typically considered as a single relevant parcel for purposes of a takings analysis, factual nuances may dictate a more flexible approach. . . . These factual nuances may include the claimant's investment-backed expectations.

State ex rel. R.T.G., Inc. v. State of Ohio, 780 N.E.2d 998, 1009 (Ohio 2002) (citations omitted). The California cases cited by Petitioner also apply the same case-specific factual analysis to determine the relevant parcel. For example, in *Twain Harte Assocs., Ltd. v. County of Tuolumne*, 265 Cal. Rptr. 737, 745 (Cal. App. 1990), the court stated that "it seems obvious the question of whether two related parcels will be treated as one . . . [is] necessarily bound up in the 'ad hoc factual' evaluation which constitutes the test for determining a taking." *See also Aptos Seascape Corp. v. County of Santa Cruz*, 188 Cal. Rptr. 191, 197 (Cal. App. 1982) (stating that whether there are two separate parcels for taking purposes is a question of fact); *accord Bevan v. Brandon Township*, 475 N.W.2d 385, 396-397 (Mich. 1991), *cert. denied*, 502 U.S. 1060 (1992) (concluding that artificial legal devices, such as tax identification numbers, are outcome determinative in the relevant parcel inquiry).

Similarly, in *Machipongo Land and Coal Co. v. Commonwealth*, 799 A.2d 751 (Pa. 2002), the Pennsylvania Supreme Court noted that "a variety of factors for defining the relevant parcel should be considered. . . . These factors would include, but would not be limited to: unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a

single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environments; the owner's investment backed-expectations; and, the landowner's plans for development." *Id.* at 768-769. This fact-intensive analysis is the one that each lower court facing a regulatory takings issue applies.

The Petitioner cites a recent decision of the Supreme Court of Idaho, *Couer d'Alene v. Simpson*, 136 P.3d 310 (Idaho 2006), claiming this case "illustrates the divide" between the states on the issue of how to define the relevant parcel for a takings case. In fact, the *Simpson* case is again a perfect illustration of a court engaging in the consistent case-specific, factual analysis that is required to determine the relevant parcel. The *Simpson* court noted that determining the relevant parcel requires the consideration and weighing of numerous factors, and that "the relative weight of any one factor will necessarily depend on the facts developed. . . ." *Id.* at 321. Some of the factors the *Simpson* court suggests are relevant include transfers of ownership, whether the same or different restrictions apply to the property, the extent to which the property was intended to be developed as a whole, the independent economic viability of the portions, and whether the portions of the property are separated by a road or way. *Id.* at 320-323. After spending a number of pages expounding on these factors, the *Simpson* court stated that its analysis was provided for the guidance of the district court, which ultimately would have to weigh the facts and make a determination based on the evidence before it on remand. *Id.* at 324.

Again, as was true with the circuit court of appeals decisions regarding the relevant parcel, this Court has

denied certiorari in three of the state court cases discussed above. *Machipongo Land and Coal Co. v. Commonwealth*, 799 A.2d 751 (Pa.), *cert. denied*, 537 U.S. 1002 (2002); *Karam*, 705 A.2d 1221, *cert. denied*, 528 U.S. 814 (1999); *Bevan*, 475 N.W.2d 37, *cert. denied*, 503 U.S. 1060 (1992). In each of these cases, the state courts engaged in an appropriate, fact-intensive analysis in order to determine what the relevant parcel was with respect to the specific factual nuances of the case before it. The same is true of the Massachusetts Supreme Judicial Court's decision below.

3. The Massachusetts Supreme Judicial Court Applied The Same Case-Specific Factual Analysis In Determining The Relevant Parcel As Have Other State Court And Lower Federal Courts

In this case, in order to determine the relevant parcel, the Massachusetts Supreme Judicial Court undertook a fact-based, case-specific inquiry of the very same factors identified by the state and federal circuit cases discussed above. Pet. App. A-9-15. Recognizing that the "[d]efinition of the relevant parcel, like the rest of the regulatory takings law, is a fact sensitive inquiry," the lower court looked to "factors that 'identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.'" Pet. App. A-9-10 (quoting *Ciampitti*, *supra* at 319).

The court's starting point was to presume that contiguous property held by the same owner would be aggregated. Pet. App. A-10. From here, the court considered "a wide array of other factors," including:

> whether the property is divided by a road; whether property was acquired at the same time; whether the purchase and financing of parcels were linked; the timing of the development; whether the land is put to the same or different uses; whether the owner intended to or actually did use the property as one economic unit; and the treatment of the property under State law.

Pet. App. A-11-12 (citations omitted), A-16-17. The lower court also stated that it considered "an owner's intended use to be an important factor when deciding whether property should be protected as a distinct unit under the takings clause." Pet. App. A-13. The court further stated that "[t]reatment of the property under State or local law is a relevant factor, but one with limited weight." Pet. App. A-14. This analysis is consistent with that conducted by other state courts and the federal circuit courts, wherein the court analyzes and weighs facts according to the particular facts and circumstances of the case.

The lower court determined that where there is contiguous, commonly-owned property, this "gives rise to a rebuttable presumption defining the relevant parcel." Pet. App. A-12. However, the court was careful to note that the "definition of the relevant parcel is a fact sensitive inquiry, and we do not propose a bright-line rule here. This presumption in favor of contiguity may be overcome to either increase or decrease the size of the parcel by the application of additional factors, including those described above." Pet. App. A-13.

The lower court noted that "[w]hile few courts explicitly employ this presumption in favor of contiguous commonly-owned property, we believe that the analysis used by many courts follows this pattern." Pet. App. A-15. As can be seen above in the brief synopsis of takings cases

from other states and federal circuit courts, this statement is accurate; the Supreme Judicial Court's analysis in this case is consistent with the analysis employed by other state and federal circuit courts, all of which are guided by this Court's regulatory taking cases, discussed *supra*. The Petitioner is incorrect in asserting that there is a conflict among the state courts.

II. THE PRESENT CASE, IN ANY EVENT, IS NOT AN APPROPRIATE CASE FOR THIS COURT TO FURTHER ADDRESS THE ISSUE OF DETERMINING THE RELEVANT PARCEL IN TAKINGS CASES

The factual circumstances of this case do not make it an appropriate vehicle for this Court to further address issues of the relevant parcel in takings cases. The Petitioner's claim is that the lower court erred in combining Lot 1 and Lot 2 for its takings analysis. However, even if this Court were to agree with that premise, the Petitioner nonetheless would have no recovery under this Court's rule set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and the record below indicates that Petitioner would have no recovery even had the court applied the *Penn Central* analysis to Lot 1 exclusively.

In *Lucas*, this Court established a limited exception to the use of the *Penn Central* factors in the "extraordinary circumstance when no productive or economically beneficial use of land is permitted." *Lucas*, 505 U.S. at 1017. This categorical rule is limited to rare situations when the regulation causes the owner to "sacrifice *all* economically beneficial uses." *Id.* at 1018, 1019. This Court has since said that the *Lucas* rule would not apply even if "the diminution in value were 95% instead of 100%." *Tahoe*, 535 U.S. at 330.

As the lower court noted, the Petitioner's claim that if a takings analysis is done as to Lot 1 in isolation, a categorical taking will be found, is erroneous. After the Petitioner sold Lot 2, he hired an appraiser to value Lot 1. That appraiser did determine that Lot 1, by itself, had no value. However, the appraiser also determined that Lot 1 would have value to an abutter were it not for the tax liability which the town was imposing. "The tax liability was based on the town assessor's determination that lot 1 was developable. Of course, the town may not continue to tax lot 1 as developable land while simultaneously denying any opportunity to build on it. The appraiser concluded that should lot 1 be reassessed as an undevelopable lot, it would have a value of between $3,000 and $8,000 to an abutter." Pet. App. A-5 n.3. Because the land was not rendered economically valueless, there can be no categorical taking.

Finally, even a cursory review of the lower court's *Penn Central* analysis as to Lots 1 and 2 indicates that the same outcome would result for the Petitioner even had the court conducted such analysis as to Lot 1 exclusively. The lower court noted that the Petitioner had no reasonable investment-backed expectations whatsoever, having purchased a lot of land for $130,000 under the mistaken belief that he had acquired only one buildable lot, and having invested nothing beyond this upon the discovery that he actually had acquired two lots. Pet. App. A-18. The lower court's analysis regarding diminution in property value indicates that there was a diminution in value, Lot 1 having been assessed at $132,800 prior to the town's denial of a permit. Pet. App. A-19. However, as the Petitioner's own appraiser concluded, Lot 1 has not been rendered valueless, and more importantly, diminution in

property value alone cannot establish a taking. *Penn Central*, 438 U.S. at 131.

Finally, the lower court concluded that the character of the regulation in this case is not like a physical invasion, does not unfairly single out Petitioner, and is limited to mitigating harms or nuisances, all factors favoring a finding that there was no taking in this case. Pet. App. A-19-20. None of these findings would differ were this analysis to be conducted as to Lot 1 singly, rather than Lots 1 and 2 combined. In short, Petitioner's arguments to the effect that the lower court improperly analyzed the question of relevant parcel are rendered irrelevant by the facts of this case, because there is no taking regardless.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 06-972

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In the

Supreme Court of the United States

JOHN M. GIOVANELLA,

Petitioner,

v.

TOWN OF ASHLAND CONSERVATION COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

John Giovanella owned two pieces of property in Ashland, Massachusetts. One is a vacant lot, and one is a lot with a home on it. The lots are separately divided, independently useful, assessed separately for tax purposes, and have different addresses, but are next door to each other. The Town of Ashland has denied all economically beneficial uses of the vacant lot to preserve it in a natural state. The question presented is:

Whether it is appropriate, in regulatory takings analysis to combine a legally separate and independently economically viable lot with a previously developed lot, because the lots happen to be contiguous and owned by the same person, and to thereby defeat a claim that the government has taken one of the lots?

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I

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Town of Ashland's Brief in Response to Petition (Response) does not dispute that the decision below raises an important issue of constitutional law concerning whether to aggregate a takings claimant's legally and developmentally distinct parcel with another commonly owned parcel to find the correct unit of property for takings analysis. Instead, the Response suggests it is unnecessary to tackle this important issue now because the Court's jurisprudence provides enough guidance and there is no real conflict below because courts generally use a standardless ad-hoc approach. Secondarily, the Town suggests this is not a good vehicle to address the issue. None of these points are valid.

ARGUMENT

I

THE ISSUE OF WHETHER AND ON WHAT BASIS TO COMBINE A TAKINGS CLAIMANT'S COMMONLY OWNED PARCELS TO CREATE ONE TAKINGS UNIT IS UNSETTLED

From its inception, this Court's regulatory takings doctrine has been plagued by an inability to determine the unit of property subject to takings tests when there are multiple parcels of land. Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 Envtl. L. 175, 176 n.3 (2004) (The relevant parcel "has been a conceptual difficulty since the birth of regulatory takings in 1922 and has remained

intractable through the [Supreme] Court's most recent decisions in *Palazzolo* and *Tahoe-Sierra*."). The only direction on this issue is the Court's admonition that courts consider "the parcel as whole." But this concept is too vague to determine the boundaries of the property subject to takings analysis ("the parcel as a whole") when the claimant owns multiple parcels of land, some of which are not burdened by the challenged regulation. *See Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 497 (1982) ("the [Supreme] court's broad [parcel as a whole] language does not resolve the question presented here" as to whether to aggregate "contiguous property for which different zoning designations were adopted").

Even the Town, which initially casts the "parcel as a whole" concept as a sufficient standard, agrees that "[t]he Court's reference to the 'parcel as a whole' and the 'property in its entirety' does not . . . resolve the specific factual inquiry regarding what constitutes the whole parcel or entire property." Response at 7.

It is this "specific" question—how to find the particular "whole parcel" or "property in its entirety" for takings scrutiny when the property owner/claimant owns multiple parcels—that is critical to the Court's regulatory takings doctrine. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180 (Fed. Cir. 1994) ("[T]he question of whether there has been a partial or total loss of economic use (in the latter case a 'categorical' taking) . . . depends on what is the specific property that was affected by the permit denial."); *State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998,1007 (Ohio 2002) ("Determining the relevant parcel of the takings fraction is critical because it usually determines the applicable takings test."). Without a method for identifying the area of property subject to takings analysis, existing takings test are more of a rhetorical aspiration than a constitutional rule. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 n.7 (1992).

Notwithstanding its importance, this Court has never directly considered the proper approach to finding the relevant takings parcel when there are multiple land parcels. *See id.*; Michael C. Blumm, *Palazzolo and the Decline of Justice Scalia's Categorical Takings Doctrine*, 30 B.C. Envtl. Aff. L. Rev. 137, 147 (2002) ("The size of the property under consideration, also known as the 'denominator issue,' is the key remaining unresolved issue in takings jurisprudence."). Perhaps one can find a few clues in current case law as to the direction the Court might go when it finally addresses the question of the relevant takings parcel, *see Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331-32 (2002) (stating in dicta that "[a]n interest in property is defined by the metes and bounds that describe its geographic dimensions"). But none of this can be confused with an intelligible and predictable set of rules. Certainly, the Court has never indicated—even in dicta—that standards for takings liability in some cases—economic impact, reasonable expectations, and the character of regulation—also define the property interest to which those standards apply, as the Town suggests. Response at 7-8.

At present, lower courts have only the "parcel as a whole," a concept whose indeterminancy has driven the courts to concoct their own criteria for determining whether parcels should be aggregated to find the relevant takings parcel. *See, e.g, R.T.G., Inc.*, 780 N.E.2d at 10-11. Thus, the well-established view of the legal community, including the court below, *see* Petitioner's Appendix at A-9, is that this Court's precedent is inadequate to resolve the issue of when a claimant's regulated land interests should be subject to takings analysis without respect to other holdings. *See* Wright, *supra*, at 191 ("[T]he Court's current rule, if we could call it that, is both vague and unhelpful" as it has not "explained the parameters of the [parcel as a whole] rule."). Only direct

scrutiny of the issue will bring the clarity needed in this important area of takings law.

II

THE LOWER COURTS ARE IN CONFLICT ON THE CRITERIA THAT DRIVE THE DETERMINATION OF THE RELEVANT TAKINGS PARCEL

The Town recognizes "the varying outcomes that [lower] courts have reached regarding whether to aggregate contiguous, commonly owned parcels of land," Response at 4, but claims the courts are not really in conflict because they apply a fact specific approach. But the very reason there are "varying outcomes" below is because courts, lacking any intelligible standards, cannot agree on *what type of facts* support the aggregation of commonly owned parcels.

Like the Supreme Judicial Court of Massachusetts, some courts find contiguity to be especially important and to presumptively warrant aggregation of a takings claimant's land holdings. Many of these courts also stress the landowner's treatment of his land. *See District Intown Properties v. District of Columbia*, 198 F.3d 874, 880-81 (D.C. Cir. 1999).[1] But other courts focus on the objective legal and economic characteristics of the restricted parcel in considering whether to

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[1] The Town claims the D.C. Circuit's *District Intown* decision articulated a multi-factor approach like that of some other courts, yet does not deny that *District Intown* decided the relevant parcel issue in favor of aggregation because the parcels "were spatially and functionally contiguous and had been treated by plaintiff as a single indivisible property for more than 25 years." Response at 12. In so doing, *District Intown* is in conflict with decisions from the Federal Circuit and Ninth Circuit that give little weight to contiguity and subjective landowner treatment and instead define the relevant parcel based on legal and economic features of the owner's property. *See* Petition at 15-16.

combine it with other property. *See American Savings and Loan Association v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981) (rejecting "physical contiguity" in favor of inquiry into whether the parcels that are independently economically viable and subject to different zoning).

Unfortunately, in its zeal to deny any federal conflict, the Town badly misrepresents the Ninth Circuit's *American Savings* decision, claiming it looked to "physical contiguity; unity of ownership; and unity of use" to find the relevant parcel. Response at 13. In fact, American Savings explicitly *rejected* this inquiry in regulatory takings cases. 653 F.3d at 369. Conversely, the D.C. Circuit squarely *applied* the physical contiguity and unity of ownership approach rejected by *American Savings* in the *District Intown* case, *see* 198 F.3d at 880, thus putting the D.C. Circuit in manifest tension with the Ninth Circuit.

Thus, whether or not courts can be generally said to favor a "factual" inquiry, their actual approach to deciding the relevant parcel is fundamentally inconsistent; some rule primarily by reference to the legal and regulatory status of the claimant's parcels, and independent economic viability, others rely on contiguity and landowner intentions. Still other courts purport to consider all these factors, in a rudderless balancing inquiry. Lower courts are thus similar only in their lack of a guiding framework.

There is a real conflict as to the appropriate standards and their weight on the issue of whether a takings claimant's regulated property stands alone or is to be combined with a larger area of land for takings analysis. This type of confusion has always been worthy of this Court's attention. *See, e.g. Dolan v. City of Tigard*, 512 U.S. 374, 377, 389-90 (1994) (granting certiorari to address the issue of "the required degree of connection between the exactions imposed by the city and

the projected impacts of the proposed development," on which state courts disagreed).

III

THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THE FACTORS THAT DEFINE THE RELEVANT (WHOLE) PARCEL

In asking the Court to resolve the conflict and confusion on the relevant parcel issue, Petitioner John Giovanella (Giovanella) is not asking the Court to "reconsider" any of its prior takings decisions; after all, as the first section shows, no prior decision considered the issue here. Nor does he seek to abrogate the "parcel as a whole" concept. Petitioner is simply requesting instruction on *the reach* of that concept; he is asking the Court to identify the specific criteria that determine whether a parcel subject to a challenged regulation should be combined with a commonly owned parcel for takings analysis. Even more precisely, he is asking whether a legally separate and independently economically viable parcel can be combined with a similar parcel under common ownership to create a large takings unit that dilutes the force of a takings claim.

Contrary to the Town's claims, Giovanella has not advocated a per se rule categorically defining the relevant takings parcel as the parcel subject to the challenged regulation. Giovanella's position is that courts should weigh the economic viability of the restricted parcel, *see, e.g., City of Coeur D'Alene v. Simpson*, 136 P.3d 310, 323 (Idaho 2006) ("The economic independence test accounts for the very factors by which property is defined, at least in the takings context: use, economics, and regulation. We believe it is a fair and accurate factor"), and its legal identity. *Lucas*, 505 U.S. at 1016 n.7 (suggesting in dicta that relevant parcel may be defined by "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or

elimination of) value"); *Simpson*, 136 P.3d at 323 (separate taxation status is important). If these factors indicate that the regulated parcel is independent from other commonly owned parcels, the presumption should be that it is a separate unit for takings analysis and not to be combined with the claimant's other parcels, whether contiguous or not.

This case is an appropriate vehicle for reviewing these issues and arguments. The decision below plainly and exhaustively addressed the issue of whether and on what basis to aggregate Giovanella's legally distinct parcels, and opted to adopt a novel presumption of law that contiguous parcels are one. There are no procedural issues that might complicate the ability of the Court to reach the merits of the relevant land parcel issue. Finally, the timing is right; lower courts have struggled with the issue for decades without this Court's input and without consensus.

There is nothing to the Town's argument that this case is less than ideal because there is no taking even if the Court considers Giovanella's regulated lot, rather than his combined lots, to be the proper unit of analysis. The lower court's decision to aggregate Giovanella's legally and developmentally independent lots (one of which was developed long ago) drastically reduced the economic impact of the Town's actions —the central question of regulatory takings analysis—and thereby skewed the outcome against a taking. In fact, the court below believed its combination of Giovanella's parcels *entirely defeated* the Town's liability for a per se taking. Petitioner's Appendix at A-17. The court's economic impact analysis would have to change if Giovanella's valueless parcel were alone defined as the correct relevant parcel, and the likelihood of liability would necessarily increase.[2] Thus, the relevant

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[2] Petitioner notes that this Court need not necessarily reach the ultimate issue of the Town's liability. If the Court adopts standards

(continued...)

parcel issue here is not academic; it has significant implications for Giovanella's constitutional rights and the rights of similar property owners.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

DATED: February, 2007.

Respectfully submitted,

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[2] (...continued)
for determining the relevant parcel that differ from the lower court, and these suggest that Giovanella's valueless lot is alone the appropriate property unit, the Court can remand the case to the Supreme Judicial Court of Massachusetts for revised takings analysis.

(3)

No. 06 - 972

In the
Supreme Court of the United States
October Term, 2006

JOHN M. GIOVANELLA,
Petitioner,
v.
TOWN OF ASHLAND CONSERVATION COMMISSION,
Respondent.

On Petition for Writ of *Certiorari*
to the Massachusetts Supreme Judicial Court

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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February 15, 2006

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On Petition for Writ of *Certiorari*
to the Massachusetts Supreme Judicial Court

MOTION OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

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February 15, 2006

Pursuant to Supreme Court Rule 37.2, counsel for *Amicus Curiae* New England Legal Foundation ("NELF") have attempted to secure written consent for the filing of the attached *Amicus Curiae* Brief from counsel for the Petitioner and Respondent. Counsel for Petitioner granted such consent and its assent is on file with this Court. Counsel for *Amicus* requested assent from counsel for Respondent on February 9, 2007. By teleconference of February 12, 2007, Joseph M. Hamilton, Esq., counsel for Respondent stated that he would not be able to assent to the filing of the accompanying brief by *Amicus*. Accordingly, *Amicus Curiae* NELF hereby moves this Court for leave to file the Brief of *Amicus Curiae* which is submitted and bound herewith. *Amicus* make this motion on the following grounds:

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations, primarily from New England.

NELF's members are affected by the real estate development climate in New England. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. A healthy climate for real estate investment and development is a mark of a vital and vibrant economy and depends on secure rights for property owners. For those reasons, NELF's members are concerned about the issues

presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* No. 06-484 (U.S. argument scheduled March 28, 2007); *Watters v. Wachovia Bank, N.A.,* No. 05-1342 (U.S. argued Nov. 29, 2006); *Rapanos v. United States,* 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection,* 126 S. Ct. 1843 (2006); *Kelo v. City of New London,* 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280 (2005); *Commissioner v. Banks,* 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000). In addition, *Amicus* served as *amicus curiæ* in the court below. *Giovanella v. Conservation Commission of Ashland,* 447 Mass. 720, 857 N.E.2d 451 (2006).

Amicus believes that this case addresses a significant issue in regulatory takings analysis, the determination of the relevant parcel. Property owners and those involved in real estate development are concerned with this issue because legal analysis based on each separate buildable parcel affected by a land-use regulation, and not on all nearby property under common ownership, appropriately focuses regulatory review on the true cost of the regulation to the property owner and treats property investment fairly.

Amicus Curiæ therefore believes that this Brief provides an additional perspective, which may aid the Court in

determining whether to grant the petition for a writ of *certiorari* of the petitioner, John M. Giovanella ("Giovanella").

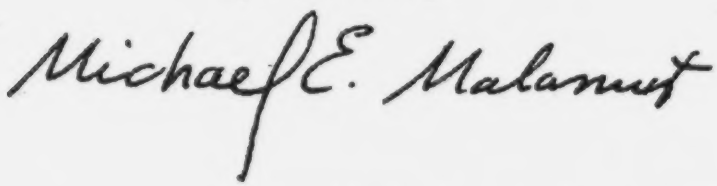
Further, pursuant to Supreme Court Rule 37.6, counsel for *Amicus* state that neither counsel for Petitioners nor counsel for Respondent authored the accompanying brief in whole or in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief.

Wherefore, *Amicus* respectfully request that this Court grant NELF leave to file as *Amicus Curiæ* the attached brief in support of the Petition for a Writ of *Certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,



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February 15, 2007

QUESTION PRESENTED

Amicus Curiæ New England Legal Foundation ("NELF") adopts the statement of the question presented contained in the Petition of Petitioner John M. Giovanella ("Giovanella"), as follows:

1. Whether it is appropriate, in regulatory takings analysis, to combine a leally separate and independent economically viable lot with a previously developed lot, because the lots happen to be contiguous and owned by the same person, and to thereby defeat a claim that the government has taken one of the lots?

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BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIÆ*

Amicus Curiæ New England Legal Foundation ("NELF") seeks to bring to the Court's attention its views, and those of its supporters, concerning the scope of the takings clause under the Fifth and Fourteenth Amendments to the United States Constitution.[1]

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of

1 Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* state that neither counsel for Petitioners nor counsel for Respondent authored this Brief in whole or in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief.

promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations, primarily from New England.

NELF's members are affected by the real estate development climate in New England. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. A healthy climate for real estate investment and development is a mark of a vital and vibrant economy and depends on secure rights for property owners. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, No. 06-484 (U.S. argument scheduled March 28, 2007); *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (U.S. argued Nov. 29, 2006); *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). In addition, *Amicus* served as *amicus curiæ* in the court below. *Giovanella v. Conservation Commission of Ashland*, 447 Mass. 720,

857 N.E.2d 451 (2006).

Amicus believes that this case addresses a significant issue in regulatory takings analysis, the determination of the relevant parcel. Property owners and those involved in real estate development are concerned with this issue because legal analysis based on each separate buildable parcel affected by a land-use regulation, and not on all nearby property under common ownership, appropriately focuses regulatory review on the true cost of the regulation to the property owner and treats property investment fairly.

Amicus Curiæ therefore believes that this Brief provides an additional perspective, which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioner, John M. Giovanella ("Giovanella"). Pursuant to Supreme Court Rule 37.2 (b), counsel for *Amicus* has bound a motion for leave to file this Brief together with the Brief, as counsel for Respondent has withheld consent for the filing of this Brief.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of the Petitioner.

SUMMARY OF ARGUMENT

The approach urged by *Amicus* here, which would focus analysis on the separate parcel affected by the regulation at issue, is supported by the seminal eminent domain analysis of Professor Frank I. Michelman, which has been relied upon by both this Court and other courts throughout the nation, including the court below. Professor Michelman analyzes separate parcels as distinct units when they are separated by geography or local legal distinctions. In this case, the two

adjacent lots owned by Mr. Giovanella had long been subdivided and taxed as separate building lots. Only one of the two lots was restricted by the local wetlands ordinance that rendered that lot unbuildable. Therefore, because the regulation affected only one of the two long-separated lots, the "parcel as a whole" for purposes of regulatory takings analysis should consist solely of the one parcel affected by the ordinance.

ARGUMENT

I. The analysis of the impact of an asserted regulatory taking begins with review of independently viable parcels of land recognized as separate under applicable local regulations.

In this Brief, *Amicus* seeks to bring to this Court's attention the need for clarity and uniformity in the "relevant parcel" doctrine as used in regulatory takings analysis under the Takings Clause of the Fifth Amendment to the federal Constitution. In his petition, Mr. Giovanella lays out the divisions among the lower courts in how to determine the "relevant parcel" when the property owner owns property in close vicinity that is treated differently by land-use regulation. Giovanella Petition at 14–20. The court below added to the confusion by creating a new presumption in "relevant parcel" analysis—namely that contiguous, separately taxed and subdivided parcels, such as Mr. Giovanella's, should be presumed to be a single parcel for "relevant parcel" analysis. *Giovanella v. Conservation Commission of Ashland*, 447 Mass. 720, 729, 857 N.E.2d 451, 458 (2006). *See* Giovanella Petition at 7–8.

In order to determine whether impact of a regulation upon property constitutes a regulatory taking, courts review how severely the regulation affects the "relevant parcel."

Keystone Bituminous Coal Assn. v. DiBenedictis, 480 U.S. 470, 514–15 (1987) (Rehnquist, J. dissenting). As this Court has recognized, the "relevant parcel" is not easy to determine when a property owner owns distinct legal units of property in the same general vicinity, such as Mr. Giovanella's two adjacent lots in this case. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). In such cases, courts first determine the "relevant parcel" by considering the "parcel as a whole" in order to analyze whether a regulatory imposition constitutes a complete regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or a partial regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1977).

If a court determines that the regulation's impact may constitute a partial (rather than a total) regulatory taking, the court then performs the three-prong *Penn Central* test. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 131 (1978).[2] The "relevant parcel" is the basis for the courts' examination of *Penn Central*'s "economic impact" prong, a significant aspect of which—the diminution in value test—considers the "takings fraction." The "takings fraction" compares the value of the "relevant parcel" after the imposition of the challenged regulation (the numerator) with the value of the parcel absent the challenged regulation (the denominator). *Palazzolo*, 533 U.S. at 631; *Lucas*, 505 U.S. at 1066. A very substantial diminution in value of the "relevant parcel" is a significant consideration under *Penn Central*'s "economic impact" prong. *See Walcek v. United States*, 49 Fed. Cl. 248, 271–

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2 The three-part *Penn Central* weighing test analyzes: (1) the economic impact of the regulation, (2) investment-backed expectations, and (3) the character of the government's action. *Penn Central*, 438 U.S. at 123–28.

72 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002). The "relevant parcel" is also the basis for consideration of the property owner's "investment-backed expectations" for that prong of the *Penn Central* takings test. *Penn Central*, 438 U.S. at 130–31 & n.27.

This Court recently acknowledged that "parcel as a whole" analysis, used to determine the "relevant parcel," lacked coherence: "Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators." *Palazzolo*, 533 U.S. at 631 (citations omitted). Nevertheless, this Court subsequently endorsed "parcel a whole" analysis in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324–35 (2002).

Despite acknowledging the continuing relevance of "parcel as a whole" analysis, this Court has provided minimal guidance as to the meaning of the term, resulting in the significant divisions among the state and federal courts on this issue. *See* Giovanella Petition at 14–20. The Court has, however, indicated that separate legal interests, such as the legally subdivided lots at issue in this case, might warrant separate treatment in "relevant parcel" analysis. *See Lucas*, 505 U.S. at 1016 n.7 ("The answer to [the "relevant parcel" conundrum] may lie in how the owner's reasonable expectations have been shaped by the state's law of property--*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.").

As discussed in greater detail below, *Amicus* submits

that, following the economic principles underlying the *Penn Central* test, the definition of "parcel as a whole" that most closely follows the intent of *Penn Central* treats separately each legally distinct parcel affected by the contested regulation.

II. The seminal article underlying regulatory takings analysis focuses the "relevant parcel" inquiry on the property affected by the regulation.

Professor Frank I. Michelman, in his seminal article relied on heavily in *Penn Central*, 438 U.S. at 128, indicates that the relevant parcel is "the preexisting value of the *affected* property." *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967) (emphasis added).[3] Discussing the meaning of the "affected property," Michelman makes it clear that courts should focus on the distinct parcel affected by the regulation, even if it is under common ownership and management with adjacent parcels:

> [T]o determine compensability one is expected to focus on the particular 'thing' injuriously

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3 *See Palazzolo*, 533 U.S. at 631 (citing Michelman on "the difficult, persisting question of what is the proper denominator in the takings fraction"); *Lucas*, 505 U.S. 1030 (citing Michelman); *id.* at 1054 (Blackmun, J. dissenting) (citing Michelman on the difficulty of determining the "denominator"); *Keystone Bituminous Coal*, 480 U.S. at 497 (citing Michelman on "the critical question[] of] determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 n.17 (1985) (citing Michelman); *Kirby Forest Indus., Inc. v. United States*, 461 U.S. 1, 14 n.23 (1984) (citing Michelman); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 n.5, 436 (1982) (citing Michelman); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (citing Michelman for the concept that "the aggregate must be viewed in its entirety").

> affected and to inquire what proportion of its value is destroyed by the measure in question. . . . [I]f we imagine government's practically forbidding me any use of a geographically determined quarter of my farm, it is not likely that the obligation to compensate can be escaped by the argument that only a quarter of the value of the 'thing' has been destroyed.

Id., at 1192–93.[4] *See* Steven J. Eagle, *Regulatory Takings* § 11-

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4 Michelman describes the rationale for treating distinct sections of adjacent property under common ownership as separate "parcels" for regulatory takings purposes:

> The worth of this kind of analysis in a utilitarian compensation program depends on a number of assumptions . . . (1) that one thinks of himself not just as owning a total amount of wealth or income, but also as owning *several discrete "things"* whose destinies he controls; (2) that deprivation of one of these mentally circumscribed things is an event attended by *pain of a specially acute or demoralizing kind*, as compared with what one experiences in response to the different kind of event consisting of a general decline in one's net worth; and (3) that events of the specially painful kind can usually be identified by compensation tribunals with relative ease. . . . The zoned-out apartment house owner no longer has the apartment investment he depended on [and deserves compensation], whereas the nearby land speculator who is unable to show that he has yet formed any specific plans for his vacant land still has a package of possibilities with its value, though lessened, still unspecified--which is what he had before.

Michelman, 80 Harv. L. Rev. at 1234 (emphasis added). *See* Richard A. Epstein, *Takings*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 561, 564 (Peter Newman ed., 1998) (discussing demoralization costs);

7(e)(5), at 813-14 (2d ed. 2001) (landowner could satisfy an objectivity requirement by showing that the asserted property interest taken constitutes a "commercial unit" that is traded in the vicinity, in this case, the separately buildable and taxable lot).

In other words, once property has been legally subdivided by the initial property developer and sold, as was the case with Mr. Giovanella's two lots, the owner has separate expectations as to each individual lot, as each lot is capable of being re-sold and developed independently. At the time that the Ashland wetland ordinance at issue in this case was passed, each lot was a distinct, easily identified unit, with its own clear development expectations. *Giovanella,* 447 Mass. at 722, 857 N.E.2d at 453. Mr. Giovanella's lot that was rendered unbuildable by the local wetland ordinance is similar to the geographically determined quarter of Professor Michelman's hypothetical farm which was a separately identifiable unit before the imposition of the challenged regulation.

Moreover, by analogy to physical takings, "relevant parcel" analysis should treat already subdivided lots differently from larger, undivided parcels. In a physical taking, subdivided lots, even when undeveloped, are valued higher than similar property that has not been subdivided, because each subdivided lot can readily be valued as a separate buildable lot. In Massachusetts, as in most other jurisdictions, under the "lot method" or "developer's residual approach" of valuation a property owner subject to a physical taking can obtain compensation for each lot in a potential subdivision

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James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain,* 69 MINN. L. REV. 1277, 1303 (1985) (similar).

upon proof "that the likelihood of obtaining subdivision approval and zoning relief was 'reasonably probable, rather than merely possible . . . .'" *McLaughlin v. Board of Selectmen of Amherst*, 38 Mass. App. Ct. 162, 172, 646 N.E.2d 418, 424 (1995), *aff'd*, 422 Mass. 359, 365, 664 N.E.2d 786, 790 (1996). *See Algonquin Gas Transmission Co. v. 60 Acres of Land, More or Less, in Brockton*, 855 F. Supp. 449, 453 (D. Mass. 1994); *Clifford v. Algonquin Gas Transmission Co.*, 413 Mass. 809, 820–21, 604 N.E.2d 697, 703–04 (1994). *See also United States v. 100 Acres of Land, More or Less, in Marin County*, 468 F.2d 1261, 1266–67 (9th Cir.), *cert. denied*, 414 U.S. 864 (1972); *United States v. 147.47 Acres of Land in Monroe County*, 352 F. Supp. 1055, 1059–60 (M.D. Pa. 1972); 4 JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 12B.14[1] at 12B-157–58, 159 (3d ed. 2006) ("When the land has actually been subdivided the evidence is admissible, bearing directly on the highest and best use and potential use is no longer remote or speculative." "Determining the market value presents little problem where the land has actually been subdivided. In that case, there being little speculation as to use, the lots may be valued individually."). *See NICHOLS ON EMINENT DOMAIN* § 12B.14[1] at 12B-177–81 (discussing "lot method").

In this case, the lots in question had long been independently buildable, separately taxed, subdivided lots. *Giovanella*, 447 Mass. at 722, 857 N.E.2d at 453. Only the passage of the Ashland wetland ordinance after Mr. Giovanella's purchase of the lots rendered the unbuilt lot unbuildable. *Id.*, 447 Mass. at 723–24, 857 N.E.2d at 454–55. Had Mr. Giovanella's property been taken by a physical taking, rather than a regulatory taking, each lot would have been treated separately under the "lot method" of appraisal. By analogy, a similar conceptual analysis in the regulatory taking

context is fair and reasonable.

Amicus notes that the Ohio Supreme Court recently decided that only those portions of a large area under common ownership that were affected by a regulation were to be considered as the "relevant parcel." *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 11-12, 780 N.E.2d 998, 1008-09 (2002) ("*R.T.G.*"). In that case, the property owner was a mining company that owned both mining rights and surface fee rights in a large area, only some of which was covered by the new regulation prohibiting surface mining. In Ohio, as in a number of states, mining rights constitute a separate legal estate from the surface fee, each capable of independent sale. The court held that the relevant parcel was the mining estate within the "unsuitable for mining" designation, which constituted just about half of the total acreage under common ownership. *Id.*, 98 Ohio St. 3d at 12, 780 N.E.2d at 1009. Just as with Mr. Giovanella's two lots prior to the passage of the Ashland wetland ordinance, in *R.T.G.* the separate parts of the *R.T.G.* contiguously owned property—the surface and mining estates—were severable and of value in their own right prior to the imposition of the "unsuitable for mining" designation. *Id.*, 98 Ohio St. 3d at 11, 780 N.E. 2d at 1009.

The Idaho Supreme Court recently reached a similar conclusion in *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310, 319-21 (2006) (remanding for reconsideration of appropriate denominator; separate ownership of adjacent parcels previously under common control began inquiry, but parcels would be considered together if municipality could show on remand that separation of parcels was "accomplished for the purpose of creating an advantageous denominator"). The court treated upland and beachfront parcels (three

separate tax lots) separately when only the beachfront parcels were subject to the prohibition on building within 40 feet of the shoreline. *Id.*, 136 P.3d at 313-14. The court took this approach even though the parcels shared the same street address (unlike Mr. Giovanella's lots in this case, *Giovanella,* 447 Mass. at 722, 857 N.E.2d at 453), and even though the sale that separated ownership of the two properties (which occurred after the land-use dispute, as in this case) was an insider sale to a corporation wholly owned by the children of the original owners, unlike the arms' length sale of the unbuilt lot in this case. *Compare City of Coeur d'Alene,* 136 P.3d at 313-14, 319-20, *with Giovanella,* 447 Mass. at 723, 857 N.E.2d at 454.

As described in detail by Mr. Giovanella, a number of courts (including the court below) have strayed from the original meaning of the "parcel as a whole" concept as developed by Professor Michelman in his seminal article, by including virtually any land in the vicinity under common ownership, regardless of the regulatory effects on each separate unit of land. *See* Giovanela Petition at 15–20. *Amicus* therefore urges that this Court grant *certiorari* to clarify the meaning of "parcel as whole" in regulatory takings analysis as applied to separate units of property held under common ownership.

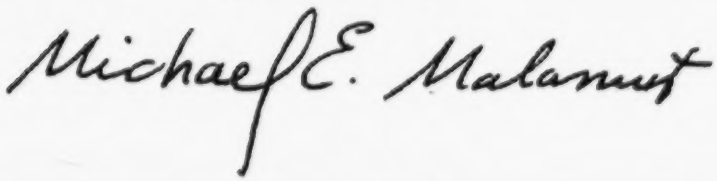
CONCLUSION

For the reasons stated above, this Court should grant Mr. Giovanella's Petition for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,



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